SUPREME COURT, U. S.

No. 247

In the Supreme Court of the United States

OCTOBER TERM, 1968

FEDERAL POWER COMMISSION, PETITIONER

v.

UNITED GAS PIPE LINE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered on January 10, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a–15a) is reported at 388 F. 2d 385. The opinion and order of the Federal Power Commission are reported at 31 F.P.C. 1180. (See II R. 32–55; the relevant portions are at II R. 41–42, 31 F.P.C. at 1190–1191.[1]) The Commission's decisions on the appli-

[1] "R" refers to the record in *Federal Power Commission* v. *United Gas Pipe Line Co.*, No. 127, October Term, 1966. A motion has been filed for leave to treat that record as part of the record here.

cations for rehearing are reported at 32 F.P.C. 687, 879, and 1163. An earlier opinion of the court of appeals setting aside the Commission's order is reported at 357 F. 2d 230. This Court's opinion reversing that judgment of the court of appeals and remanding to that court for further proceedings is reported at 386 U.S. 237.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1968 (App. B, *infra,* pp. 16a–17a). A timely petition for rehearing was denied on March 1, 1968 (App. C, *infra,* p. 18a). An order was entered on May 22, 1968, extending the time for filing a petition for a writ of certiorari to and including June 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether respondent's petition for rehearing to the Federal Power Commission adequately preserved for appellate review, as Section 19(b) of the Natural Gas Act requires, the question whether the Commission had properly applied its formula (developed in *Cities Service Gas Co.,* 30 F.P.C. 158, and approved by this Court in *Federal Power Commission* v. *United Gas Pipe Line Co.,* 386 U.S. 237) for determining the federal income tax allowance in the cost of service of a natural gas company which returns its income as part of a consolidated group of affiliated companies.

2. If so, whether application of that formula re-

quires that taxable income from respondent's direct sales to industrial users be set off against the net unregulated losses of its affiliates before any tax savings resulting from those losses are applied in reduction of repondent's cost of selling gas for resale.

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part:

> SEC. 4. (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. * * *
>
> (e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *.
>
> SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State,

municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Com-

mission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

STATEMENT

1. THE FACTS

United Gas Pipeline Company (United), a major interstate natural gas pipeline company, was a wholly owned subsidiary of United Gas Corporation (Gas Corporation).[2] The latter's principal business is the operation of several local gas distribution systems in Texas, Louisiana and Mississippi. Its other subsidiaries, also wholly owned, are Union Producing Company (Union), a domestic producer of oil and gas, and United Overseas Production Corporation (Overseas), which is engaged in foreign oil exploration. The companies are part of a group which files, pursuant to Section 1501 of the Internal Revenue Code of 1954 (26 U.S.C. 1501), consolidated federal income tax returns.

Between 1957 and 1961, the group's consolidated federal tax liability was $57,199,881, excluding capital gains (R. 53). Had separate returns been filed, the total tax (excluding the taxes that would have been paid on inter-company dividends)[3] would have been

[2] Gas Corporation has been acquired by and merged into Pennzoil Company since the record closed in this case. The new company is called Pennzoil United, Inc.

[3] During the five-year period, Gas Corporation received $66,567,028 in dividends from United and Union, on which a tax of about $5 million would have been due had separate returns been filed. Prior to 1964, 15 percent of all dividends received by corporations were taxable as ordinary income, unless consolidated returns were filed. Section 214 of the Revenue Act of 1964 permits the exclusion of 100 percent of dividends received from 80-percent-owned affiliates. 78 Stat. 52, 26 U.S.C. 243.

$59,291,919. The difference reflects the fact that in the consolidated returns the group was able to set off Union's net tax losses of $3,869,626, and the $24,354 loss of Overseas (which commenced operations in 1961, see II R. 24), against the income of United and Gas Corporation.

2. THE PROCEEDING BEFORE THE COMMISSION

This case began on June 15, 1962, when United, pursuant to Section 4(d) of the Natural Gas Act (p. 3, supra), filed revised schedules with the Federal Power Commission increasing its rates overall. After a hearing, the Commission, on May 14, 1964 (31 F.P.C. 1180, II R. 32), made the reduction here involved. The Commission ruled that United had improperly included in its cost of service an allowance for federal income taxes computed at the 52 percent tax rate which would have been applicable had United filed a separate return.[4]

United's effective tax rate was determined by allocating the entire system's consolidated tax liability according to the formula the Commission had developed in *Cities Service Gas Co.*, 30 F.P.C. 158, later set aside in *Cities Service Gas Co.* v. *Federal Power Commission*, 337 F. 2d 97 (C.A. 10). In *Cities Service* the Commission had declined to determine the tax component of the cost of service of Cities Service Gas Company "on the basis of a hypothetical figure"

[4] Other cost factors were determined according to a stipulation between United and consumer interests, which the Commission approved.

that would have been its liability if it had been a separate company, rather than part of an affiliated group that filed consolidated tax returns. Recognizing, however (30 F.P.C. at 162), "the fundamental rate making principle" that "requires a separation between regulated and unregulated costs and revenues", and that Cities Service, to some extent, could have rearranged its corporate structure to eliminate various non-regulated affiliates from the consolidated return, the Commission adopted the following formula (30 F.P.C. at 164):

> In sum, the proper method to be applied in computing the Federal income taxes to be included in the cost of service of a regulated company where that company has joined in a consolidated tax return with affiliates is (1) separate the companies into regulated and unregulated groups, (2) determine the net aggregate taxable income of each group, and (3) apportion the net total consolidated tax liability over a representative period of time between the two groups, and among the companies in the regulated group, on the basis of their respective taxable incomes; provided that the allowance so computed for the regulated company shall not exceed what its tax liability would be for rate making purposes, if computed on a separate return basis.

In applying the formula, the Commission separated into regulated and nonregulated components the businesses of two Cities Service subsidiaries, each of which produced both oil and gas. It did not, however, separate the business of Cities Service Gas Company,

some of whose sales of gas was not subject to the rate-making jurisdiction of any agency.

Under this method of the *Cities Service* case, any losses sustained by an unregulated business must first be set off against the total income of all unregulated operations. Then any loss not consumed in this set off, is applied against the earnings from the regulated operations.

In applying that method to the present case, the Commission found that "United is largely a regulated company, and we shall designate it as such for purposes of these computations." (II R. 41.) It also treated Gas Corporation, the other profit member of the consolidated group, as entirely regulated, although it has unregulated sales of gas appliances and appliance repair services (II R. 42). Since Gas Corporation and United were the only members of the system having taxable income during the five year test period the Commission used (1957–1961), the consolidated tax paid by the system during that period was allocated between those two in proportion to their respective taxable incomes (excluding capital gains) for the five years. The resulting effective tax rate was 50.04%. (*Ibid.*).

In seeking rehearing before the Commission, United's contention with respect to the consolidated tax issue was stated in full as follows (Motion appended to petition for review C.A. 5, No. 21958, p. 7):

> The Commission erred in adopting and applying to United an effective tax rate resulting from the so-called effect of the consolidated re-

turn. This record shows that a consolidated effective tax rate has effect to give gas consumers the benefit of tax deductions from non-utility costs not reflected in the cost of service. Such is beyond the authority of the Commission to accomplish.

United respectfully says that the Commission further erred in directing the computation of such tax matters in connection with the decision and opinion of the Commission in *Cities Service Gas Company,* 30 FPC [158], Opinion 396, issued July 15, 1963, in Docket No. G-18799. United shows, as the Commission of course knows, that the Cities Service Opinion is presently pending before the courts for judicial review as to the validity of such directed tax computations and the authority of the Commission so to apply them. United shows that the ultimate final judicial determination on the merits of such issues in the Cities Service case will be dispositive of the Commission's order here and United's exceptions and objections thereto.

Accordingly, United moves the Commission to supplement and amend Opinion 428 with appropriate provisions authorizing United to use and apply the statutory tax rate of 52% to United's separately ascertained taxable income pending final determination of the Cities Service case with appropriate provisions for refund upon the basis directed by Opinion 428 should the Commission's opinion in the Cities Service case be upheld and affirmed by the final judicial review and decision of such Cities Service case.

The Commission denied rehearing.

3. THIS COURT'S APPROVAL OF THE COMMISSION'S FORMULA

Thereafter, the Tenth Circuit set aside the Commission's order in *Cities Service,* 337 F. 2d 97, holding that the 52% rate must be used to determine the tax component of cost of service. That court concluded that the Commission was powerless to make any allocation because (*id.* at 101) the limits on the Commission's jurisdiction require "separation of profits and losses between regulated and nonregulated" businesses for the determination of the ingredients of the rate base. The Fifth Circuit followed this decision, and on February 10, 1966, set aside the Commission's order in this case. 357 F. 2d 230.

This Court granted petitions for certiorari filed by the Commission and by Memphis Light, Gas and Water Division. 384 U.S. 984. It then reversed the Fifth Circuit and upheld the *Cities Service* formula as a proper exercise of the Commission's regulatory authority. 386 U.S. 237. United's contention that the Commission could never reduce the tax component of cost of service below the 52% rate was rejected as calling for allowance of "the full amount of an expense never in fact incurred." The Court continued (386 U.S. at 244–245):

> Such a private decision [to file consolidated returns] made by the affiliates, including the regulated member, has the practical and intended consequence of reducing the group's federal income taxes, perhaps to zero, as was true of one of the years involved in the *Cities*

> *Service* case. But when the out-of-pocket tax cost of the regulated affiliate is reduced, there is an immediate confrontation with the rate-making principle that limits cost of service to expenses actually incurred. Nothing in *Colorado Interstate* or *Panhandle* forbids the Commission to recognize the actual tax saving impact of a private election to file consolidated returns. On the contrary, both cases support the power and the duty of the Commission to limit cost of service to real expenses.

In remanding the case, this Court, however, left open the possibility of reviewing a contention United had made in the Supreme Court but not in the Fifth Circuit—that the Commission had improperly applied the *Cities Service* formula to United—in these words (386 U.S. at 247):

> It is said here that the Commission, in applying its tax allowance formula, erroneously failed to recognize and to take account of the fact that United has both jurisdictional and nonjurisdictional activities and income. Although this is a matter which might affect the results achieved in application of the Commission's formula, it is one to which the Court of Appeals has not addressed itself, and we think it appropriate for the issue to be raised there if the parties are so inclined.

4. THE FIFTH CIRCUIT'S DECISION ON REMAND

On remand, United moved for judgment, claiming that because a large part of United's revenues—those from direct sales of gas to industrial users—allegedly were not subject to regulation by either the Federal

Power Commission or state agencies, the Commission erred in treating it entirely as a regulated company.

The court rejected the argument of the Commission that United had failed to preserve its right to judicial review of this question, stating that "to hold otherwise would be to make pleading an end unto itself." It added (App. 6a–7a):

> * * * It is difficult to believe that the Supreme Court would have remanded this case to us for further proceedings if the Commission and Memphis are correct in this opposition to the motion on this ground. Though the Supreme Court did not specifically pass on the question, its remand of the case is a definite indication of its view.

In ruling that the Commission could not treat United as an entirely regulated enterprise, the court of appeals noted (App. 7a–8a) that only 54.44% of United's revenues came from transactions subject to rate-making regulation. The court held invalid the Commission's contention that its treatment of United was reasonable because the direct industrial sales were made through pipeline facilities which were subject to certification or which carried other gas that was subject to rate regulation, saying (App. A8a), "The Commission's certificate jurisdiction is not the same as its rate jurisdiction * * * this is a rate case * * * and regulation here is *rate* regulation" (App. A8a) (emphasis in original). Memphis' argument that the revenue from all of United's businesses, whether or not subject to rate making regulation, benefitted in equal degree from the use of consolidated returns was thought inconsistent with this Court's statement in this case (386

U.S. at 243) that "Ratemaking is, of course, subject to the rule that the income and expense of unregulated and regulated activities should be segregated," and the like ruling in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635.

The fact that the Commission, in *Cities Service,* had not split the revenues of the natural gas transmission company into regulated and unregulated components was attributed to an alleged failure of the record in that case to provide the data required for such an allocation. On the basis of computations that United had presented for the first time in its brief on the merits in this Court, the Fifth Circuit concluded (App. A 14a–15a):

> It is apparent that income from the unregulated component of United is sufficiently large to absorb all such net tax losses and no excess remains to reduce the regulated taxable income of United.

It directed the Commission to recompute United's tax allowance on this basis.

REASONS FOR GRANTING THE WRIT

The threshold question in this case is whether United's petition for rehearing before the Federal Power Commission had sufficient specificity to preserve for appellate review the question whether the *Cities Service* formula requires the initial application of the losses of Union and Overseas against profits United derived from sales of gas that were not subject to federal, state or local rate regulation. The only fair reading of the relevant portion of the petition for rehearing (see *supra,* p. 8–9) is as a claim that the

Cities Service formula was entirely invalid and that a tax allowance based on the 52% rate was mandatory. Nothing in the petition alerted the Commission to the possibility that United claimed that, if the formula was valid, one part of United's revenues had priority over the remainder in receiving the benefits of its affiliates' losses.

This defect is more than technical. Section 19(b) and comparable provisions of every other federal regulatory statute are designed to give the regulatory agency a final opportunity, after the proceeding is in every other way completed, to correct or to explain more fully any matter that an aggrieved party considers worthy of appellate review. Here, the court of appeals was forced to decide for itself how the Commission might have applied the *Cities Service* formula had United's present contentions been properly developed in a petition on rehearing. In its analysis the court of appeals erred in failing to recognize that in *Cities Service* the Commission, on a like record, had not separated the revenues of a natural gas company in the manner United here demands. The result is a decision that creates continuing uncertainties as to the validity and utility of the formula this Court approved before remanding the case to the Fifth Circuit, even though general principles of ratemaking and this Court's rationale fully support the Commission's authority to decline to make the allocation United seeks.

1. Section 19(b) of the Natural Gas Act expressly limits appellate review of orders of the Federal Power Commission to such objections as "[had] been

urged before the Commission in the application for rehearing * * *".[5] Section 19(a) requires that "[t]he application for rehearing shall set forth specifically the ground or grounds upon which such application is based."

These provisions, as well as like requirements in other regulatory statutes, are but one aspect of the overall "policy that a party must exhaust its administrative remedies before seeking judicial review." *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 499. As this Court further stated (*id.* at 500):

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37. See also, *Riss & Co. United States*, 341 U.S. 907; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155.

Thus a failure to raise an issue in a petition for rehearing bars reversal of the Commission on that ground. *Federal Power Commission* v. *Sunray DX Oil Co.*, No. 60, Oct. Term, 1967, Slip Op. p. 22 n. 21, p. 35 n. 45; see also, *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil*

[5] United has not invoked the statutory exception applicable to cases where the moving party had "reasonable ground for failure" to raise a point in the rehearing petition.

Co. v. *Federal Power Commission,* 364 U.S. 137, 157; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635, 649, 650–651.

The court of appeals' holding that United's petition for rehearing was sufficiently specific apparently rests on the following sentences (and particularly the use of the word "applying" in the opening sentence *supra,* pp. 8–9):

> The Commission erred in adopting and applying to United an effective tax rate resulting from the so-called effect of the consolidated return. This record shows that a consolidated effective tax rate has effect to give gas consumers the benefit of tax deductions from non-utility costs not reflected in the cost of service. Such is beyond the authority of the Commission to accomplish.
>
> United respectfully says that the Commission further erred in directing the computation of such tax matters in connection with the decision and opinion of the Commission in *Cities Service Gas Company* * * *.

The first paragraph is only a general claim that United's cost of service cannot include a tax allowance "resulting from the so-called effect of the consolidated return"—*i.e.* the tax liability must be computed on the 52 percent rate that would have applied if United had filed a separate return. The second paragraph adds only a specific contention that the *Cities Service* formula is improper. There is no sug-

gestion that any alternative argument is contingently advanced on the assumption that the *Cities Service* approach is appropriate. Not a word of United's 48-page petition for rehearing even acknowledged the Commission's statement, in the opinion to which the petition for rehearing was addressed, that "[i]n making a separation between the regulated and non-regulated companies we find that United is largely a regulated company, and we shall designate it as such for the purpose of these computations" (II R. 41; 31 F.P.C. 1180 at 1190).

The only justification for the court of appeals' result would be a view that a party may raise on appeal any specific item that is arguably subsumed in the general allegations of the petition. Then United, having claimed that "an effective tax rate" cannot be applied to it, would presumably be entitled to attack on appeal any part of the calculation of its allowance.

Perhaps such an approach is appropriate in construing a complaint in a lawsuit where specific facts and contentions may be developed through discovery and other pretrial procedures. But the problem here is not, as the court of appeals seemed to reason, comparable to determining the niceties required of a plaintiff in what is only the opening salvo of civil litigation. The petition for rehearing in a regulatory proceeding is the final act of a protracted proceeding. It comes at a time when the record is complete, the facts found, and the Commission's expert judgment and view of the law announced. It is designed to settle definitively

the contentions available to a party in the event that judicial review is sought.[6]

More is at issue here than a technical failure to raise a question in a petition for rehearing. The subject matter—whether and how United's revenues should be divided for determining the tax component of its cost of service—is particularly susceptible to the informed analysis which is the agency's province. This is especially true here; the validity of United's argument requires interpretation and application of another decision of the Commission, and acceptance of that argument depends on United's own complex calculation, which has never been exposed to Commission scrutiny. As this Court has said (*Federal Power Commission* v. *Colorado Interstate Gas Co., supra,* 348 U.S. at 501):

> The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges. The Federal Power Commission is an administrative agency the de-

[6] We find no support in this Court's earlier opinion in this case for the court of appeals' view that by directing remand this Court, *sub silentio*, rejected the contention that United failed to comply with Section 19(b). United's present claims were not asserted until, as respondent, it filed its brief on the merits in this Court. Although Commission counsel, in oral argument may well have suggested that this point had not been preserved, the application of Section 19(b) was in no real sense subject to contention here. In these circumstances, and in view of this Court's consistent rulings that reversals may not be had on the basis of arguments not presented in a petition for rehearing, the question must have been left open for plenary consideration on remand.

> cisions of which involve those difficult problems of policy, accounting, economics and special knowledge that go into public utility rate making. For reviewing a rate made by the Federal Power Commission, the Court of Appeals has no inherent suitability comparable to that which it has for reviewing the judicial decisions made by a United States District Court.

It is important in the administration of natural gas regulation that this Court reaffirm the continuing vitality of its decisions enforcing the statutory requirements that objections to be considered judicially must first be addressed to the agency with sufficient specificity to indicate the substance of the objection.

2. Whether or not United's petition for rehearing adequately asserted that the *Cities Service* formula should result in a division of United's business for tax allocation purposes, it is plain that the Commission never spoke to the question. We submit that the court of appeals made two errors when it sought, without the benefit of an initial Commission analysis, to determine how the Commission would—or should—have interpreted the formula in this instance: *First,* it erred in concluding that the Commission would have made the allocation United seeks; and *second,* it erred in concluding that this Court's prior decisions in this case and others compel that result.

The Commission said here (II R. 41), "United is largely a regulated company, and we shall designate it as such for the purpose of these computations." In *Cities Service* like treatment was accorded the pipeline arm of the Cities Service complex, Cities Service Gas

Company. That company, like United, made substantial sales directly to industrial users, which are not subject to rate making regulation by any agency For example, its revenue from such sources in the calendar year 1966 was $32,535,143, representing about 28 percent of its total revenues ($111,128,789) from sales of natural gas. See F.P.C., *Statistics for Interstate Natural Gas Pipeline Companies* (1966) 103. In the same year, United's direct industrial sales accounted for $119,940,399, or some 38 percent of its natural gas revenues of $306,456,108. See *id.* at 119. There is, for present purposes, no material difference, and hence there is every reason to expect that the Commission would treat each company similarly in allocating the tax liability of the consolidated group.

The Fifth Circuit mistakenly believed that a distinction can be drawn on the ground that the *Cities Service* record lacked sufficient data to make the sort of allocation United was granted below. There appears, to be sure, in the *Cities Service* opinion, the following passage 30 F.P.C. at 163:

> there are certain companies in the Cities Service system a portion of whose business is subject to regulation. The taxable income of these companies should first be allocated into regulated and nonregulated categories. Cities Service, however, has failed to present any evidence upon which to make such an allocation.

This, however, refers not to Cities Service Gas Company, but to Cities Service Oil Company and Cities Service Production Company—two Cities Service sub-

sidiaries which were producers of both oil and gas.[7]

In fact, the record in *Cities Service* contained every element necessary to the sort of computation United advanced, and the Fifth Circuit adopted, here. *Cities Service,* like this case, was a comprehensive rate-making proceeding. As the Commission explained, the rates there involved had resulted from a rate settlement approved by the Commission on March 27, 1961, 25 F.P.C. 582, a settlement comparable to the one here. As in almost every natural gas rate case it was necessary to allocate costs among direct industrial sales and others, since the Commission's rate-making jurisdiction does not extend to the former. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra,* 324 U.S. at 639–642. Thus in *Cities Service,* there was a cost of service (25 F.P.C. at 586), which, together with the breakdown by volume of the divided industrial sales presented in Cities Service's filings, plainly would have permitted separation of the gas company's operations into those that were rate-regulated (by either the F.P.C. or State authority) and those not so regulated.

That the Commission would not have segregated

[7] Thus, the Commission said that "the taxable income of Cities Service Oil Company—represents nearly 99% of the total taxable income of the * * * companies having both regulated and nonregulated income * * *," which would not have been true if the Commission had thought it proper to include Cities Service Gas Company within the "mixed" category.

The reason that the Commission made a division in the case of the producing companies in the Cities Service complex are discussed infra.

United's revenues in the manner directed below is equally plain from the rationale of the decision in *Cities Service* to separate into two parts the businesses of the two producing companies. One element of that rationale was that the Commission saw a need to develop a formula that took account of *Cities Service's* ability, by (30 F.P.C. at 162) "rearranging affiliates, mergers or intrasystem pricing arrangements * * * to eliminate all or most of the other profit entities and thus increase the effective tax rate of the Gas Company." The two businesses of the Cities Service Oil Company and Cities Service Production Company were sufficiently distinct so as to allow Cities Service to place the gas and oil segments into separate corporate shells. This, however, is not true with respect to the direct industrial sales of Cities Service Gas Company or United, since natural gas, whatever its intended use, comes from the same sources and uses the same facilities in traveling to market.

An equally important element of the *Cities Service* rationale is to treat as "regulated" all natural gas business subject to the control of some administrative agency. There, the focus was on gas subject to the intrastate rate-making jurisdiction of state and local agencies. For tax allocation purposes, the Federal Power Commission treated such gas in the same way as the amounts sold interstate, and thus subject to its own rate-making jurisdiction. Although gas sold directly to industrial users is not directly within the Commission's rate-making jurisdiction, it is subject to the Commission's certification jurisdiction when trans-

ported in interstate pipelines, and thus subject to comprehensive controls through exercise of the Commission's power to condition its grants of authority.[8] When carried wholly through intrastate facilities, such sales are often subject to state or local certification. And to the extent that some industrial gas, by a fortuity within the pattern of state legislation, is subject neither to rate-making nor certification, it is still intermixed, from well to customer, in the gas that is so controlled.

Thus, the direct industrial sales, which United claims are entitled to "non-regulated" treatment under the *Cities Service* formula, are essentially an adjunct to gas sales that are regulated in every way. They have at least as much connection with the sales for resale as the appliance sales and repair business that the Commission, in this case, chose to treat as part of a regulated enterprise (II R. 42). There is, in these circumstances, no foundation for the Fifth Circuit's conclusion that the Commission's *Cities Service* rationale requires separation of United's revenues.[9]

The court below also erred in suggesting that this Court's opinions here and in *Panhandle Eastern* compel the Commission to make the allocation of United's revenues which the court of appeals directed. This

[8] See *South Georgia Natural Gas Co.*, 23 F.P.C. 795 (direct industrial sale not certificated because proposed price below "compensatory" level); see, also, *Coastal Transmission Corp.*, 26 F.P.C. 319.

[9] If the correctness of this conclusion is considered subject to some doubt, the proper course would have been a remand to the Commission for further proceedings, on a slate free of any direction to make the allocation sought by United.

very interpretation of the *Panhandle Eastern* decision was at the heart of the Tenth Circuit's decision that held the *Cities Service* formula invalid. And this Court, in deciding the instant case, rejected that view. The function of "the rule that the income and expense of unregulated and regulated activities should be segregated" (386 U.S. at 243) is to make certain that the regulated business bears its just share of corporate costs *but no more*. Notably, both this case and *Panhandle Eastern* arise from pipeline complaints that the Commission allocated too high a cost to direct industrial rates and placed too low a burden on the cost of servicing sales for resale to the consuming public. The rule of these cases would be perverted if transmuted into a device for saddling the public with "an expense never * * * incurred" (386 U.S. at 244). And that has happened here—the Commission has been directed to include in United's cost of service an annual charge in excess of a quarter million dollars, which will be passed on to the consuming public, even though United has incurred no equivalent out-of-pocket expense.

There is no basis for concluding that United's revenues from sales to industrial users should bear any less tax burden than those realized from gas directed towards the general public. "[W]hen the out-of-pocket tax cost of the regulated affiliate is reduced, there is an immediate confrontation with the ratemaking principle that limits cost of service to expenses actually incurred." *Ibid.* The rule adopted on remand below ignores this principle and is entirely at odds with the Commission's discretionary authority to adopt a rea-

sonable formula that equitably allocates the total tax liability among United and its corporate relatives (see *id.* at 246).

3. Both questions presented have substantial impact for the conduct of business by federal regulatory agencies. By finding that bare generalities in a petition for rehearing suffice to raise a most specific issue, whose complexities were never hinted at during the proceedings before the Commission, the court of appeals has invited every party who contests agency decisions in the courts to attempt to raise questions not previously considered by the regulatory authorities.

The decision that United's revenues from direct industrial sales must receive the primary—and here the exclusive—benefit from the taxes saved through use of the consolidated return frustrates the Commission's attempt to achieve an equitable apportionment of part of those savings to the consuming public. The same question may arise in any rate-making proceeding involving pipelines which participate in consolidated tax returns and have direct industrial sales.

In addition, the tax allocation question has ramifications throughout the field of public utility regulation. It also is likely to arise in the determination of the rates of electrical companies under the Federal Power Act, 16 U.S.C. 791a–825r. There are, moreover, numerous contexts where state and local authorities deal with the problem of incorporating a proper federal income tax component within the rates

of local utilities that file consolidated tax returns with unregulated companies. In all of these circumstances, the decision here will be a controlling or persuasive precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
HARRIS WEINSTEIN,
Assistant to the Solicitor General.
RICHARD A. SOLOMON,
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PETER H. SCHIFF,
Solicitor,
Federal Power Commission.

JUNE 1968.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 21872

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MEMPHIS LIGHT, GAS & WATER DIVISION, INTERVENOR

No. 21958

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MEMPHIS LIGHT, GAS & WATER DIVISION, INTERVENOR

Petitions to Review Orders of the Federal Power Commission.

(January 10, 1968)

Before RIVES, GOLDBERG and AINSWORTH, *Circuit Judges*

AINSWORTH, *Circuit Judge:* In this matter, which involves the fixing of just and reasonable rates and charges for a natural gas company by the Federal

Power Commission, the question for decision is whether the Commission made a proper allowance for federal income taxes in calculating United Gas Pipe Line Company's (United's) cost of service in the test period involved.

The matter has been before us before when we held that the Commission's order used an incorrect income tax rate in computing cost of service in fixing United's gas rates and should, therefore, be vacated and set aside. (357 F. 2d 230 (1966).) In our former decision we relied on the Tenth Circuit's holding in *Cities Service Gas Company* v. *Federal Power Commission,* 10 Cir., 1964, 337 F. 2d 97, a similar case, "that the tax allocation was contrary to the requirement which Congress had imposed."

Thereafter, on March 13, 1967, the Supreme Court reversed this Court's decision and remanded the case "for further proceedings consistent with this opinion."[1]

In its opinion the Supreme Court said:

> Another matter deserves some comment. It is said here that the Commission, in applying its tax allowance formula, erroneously failed to recognize and to take account of the fact that United has both jurisdictional and nonjurisdictional activities and income. Although this is a matter which might affect the results achieved in application of the Commission's formula, it is one to which the Court of Appeals has not addressed itself, and we think it appropriate for the issue to be raised there if the parties are so inclined. (87 S. Ct. at 1009).

United has filed its motion for consideration and decision of the issue remanded by the Supreme Court, which motion is opposed in all respects by the Federal

[1] Sub nom. *Federal Power Commission* v. *United Gas Pipe Line Co., et al.,* 386 U.S. 237, 87 S. Ct. 1003 (1967).

Power Commission and Memphis Light, Gas & Water Division, intervenor, and is now before us for decision.

United Gas Pipe Line Company (United) is a natural gas transmission company in interstate commerce and a member of an affiliated group of companies. United Gas Corporation wholly owns United and is a gas distribution company subject to state and local regulation. There are two other wholly owned subsidiaries of United Gas Corporation in the affiliated group, namely, Union Producing Company (Union), a domestic oil and gas producer whose interstate sales of gas are subject to Federal Power Commission jurisdiction, and United Overseas Production Company (Overseas), which is engaged in oil exploration in foreign countries. The affiliated group, including United, during the five-year representative period, 1957–1961, elected to file consolidated federal income tax returns (as authorized by the Internal Revenue Code of 1954, 26 U.S.C. § 1501) because on such a basis consolidated losses served to reduce consolidated income and two members of the group, Union and Overseas, had substantial net losses over the five-year representative period. If each company of the affiliated group had filed separate returns instead of the consolidated returns actually filed, the total tax for the group would have been substantially larger than was paid on a consolidated basis. Using a formula which the Commission developed in *Cities Service Gas Company,* 30 FPC 158, the Commission allowed United $9,940,892 for federal income taxes in the test year instead of $12,099,662 claimed by United as part of its cost of service. (See *Federal Power Commission* v. *United Gas Pipe Line Company,* 386 U.S. 237, 87 S. Ct. 1003, 1005 (1967). The amount allowed by the Commission was allocated, by use of a so-called "consolidated effective tax rate" of 50.04% rather than the amount

claimed by United calculated at the statutory rate of 52% in effect when the record was closed. United's position is that the Commission erroneously applied its own tax allocation formula—the one which it adopted in the *Cities Service Gas Company* case—to United, because it ignored the fact that the Commission had jurisdiction over less than 50% of United's business, and that United had taxable income of over $47,000,000 from unregulated operations (by any federal or state agency) in the representative period to offset net unregulated oil tax deductions and losses amounting to less than $4,000,000, so that there would thus be no tax deductions and losses to apply against United's income from jurisdictional business.

United states in its motion (p. 8) that it will demonstrate "that the *wholly unregulated, FPC-nonjurisdictional* oil tax losses and deductions of Union and Overseas, when applied to that portion of United's taxable income from operations *wholly unregulated by any Federal or State agency,* leaves *no excess* of losses available to diminish United's FPC-jurisdictional taxable income. The result is that the Federal income tax allowance in United's cost of service should be computed, by application of the statutory corporate tax rate to United's FPC-jurisdictional taxable income."

The Commission and Memphis respond: (1) That the question presented by the motion is not open for decision in this Court because the issue of the proper application of the Commission's consolidated tax allowance formula was not raised by United in its petition for rehearing before the Commission and, therefore, cannot be considered by this Court; and (2) the Commission reasonably treated United as a wholly regulated operation under its Cities Service formula,

as opposed to United's contention that "the Supreme Court realized the significance of FPC failure to utilize United's substantial non-regulated taxable net income, as a part of the income against which non-regulated losses must be offset first" when it remanded this case.

I

At the outset we must dispose of the question that the issue of the proper application of the Commission's consolidated tax allowance formula was not raised by United in its petition for rehearing to the Commission and, therefore, may not be considered here. Section 19(a) of the Natural Gas Act (15 U.S.C. § 717r (a)) requires that the application for rehearing specify the grounds upon which it is based, and Section 19(b) of the Act (15 U.S.C. § 717r (b)) provides that on review by this Court no objection to the Commission's order shall be considered unless such objection shall have been urged before the Commission in the application for rehearing.[2]

The Commission and Memphis urge that United had not previously challenged the manner in which the Commission applied the consolidated tax allocation formula and that United's assignment of error in its application for rehearing was only to the authority of the Commission to apply the formula rather than to the application itself.

We have examined United's specification of error in its application for rehearing to the Commission and find the contentions of the Commission and Memphis

[2] These requirements have been enforced in several cases; see, e.g., *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 83 S. Ct. 1266 (1963); *Sunray Mid-Continent Oil Co*, v. *Federal Power Commission*, 364 U.S. 137, 80 S. Ct. 1405 (1960).

to be without merit. In United's specification of error it alleged in pertinent part the following:

> The Commission erred in adopting and applying to United an effective tax rate resulting from the so-called effect of the consolidated return.

United also averred in its application for rehearing to the Commission:

> United respectfully says that the Commission further erred in directing the computation of such tax matters in connection with the decision and opinion of the Commission in *Cities Service Gas Company*. . . . United shows, as the Commission of course knows, that the Cities Service Opinion is presently pending before the courts for judicial review as to the validity of such directed tax computations and the authority of the Commission so to apply them. United shows that the ultimate final judicial determination on the merits of such issues in the Cities Service case will be dispositive of the Commission's order here and United's exceptions and objections thereto.

Of course, the principal force of United's argument was against the authority of the Commission to adopt a consolidated tax allocation formula. But the application thereof was also challenged in United's rehearing pleadings and is sufficiently detailed and specific to permit review by this Court.[3] To hold otherwise would be to make pleading an end unto itself. It is difficult to believe that the Supreme Court would have remanded this case to us for further proceedings if the

[3] United also states in its brief in support of the present motion (p. 3) that the Commission made this same argument during oral argument in the Supreme Court and nevertheless the Supreme Court remanded the case for determination of the fact issue of the so-called erroneous failure of the Commission to recognize and to take account of the fact that United has

Commission and Memphis are correct in their opposition to the motion on this ground. Though the Supreme Court did not specifically pass on the question, its remand of the case is a definite indication of its view.

II

The approved FPC-Cities Service tax allocation formula provides that the proper method to be applied in computing the federal income taxes to be included in the cost of service of a regulated company where that company has joined in a consolidated tax return with affiliates is: (1) separate the companies into regulated and unregulated groups, (2) determine the net aggregate taxable income of each group, and (3) apportion the net total consolidated tax liability over a representative period of time between the two groups, and among the companies in the regulated group, on the basis of their respective taxable incomes.

In applying this formula the Commission found that "United is largely a regulated company, and we shall designate it as such for the purpose of these computations." (31 FPC at 1190.) This finding was made despite the fact that a computation based on facts of record shows that of the total taxable income of United for the five-year representative period ($105,290,983), 44.67% thereof is FPC jurisdictional, 9.77% is regulated by local agencies, and 45.56% is wholly unregulated by the FPC or local agencies. If the FPC-

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both jurisdictional and nonjurisdictional activities and income—a matter which might affect the results achieved in the application of the Commssion's formula.

See also Ex. D of United's motion where the parties in the agreement of rate settlement filed with the Commission (see 32 FPC 1515) specifically reserved the question of the "application and use of the federal statutory corporate income tax rate as opposed to the consolidated effective tax rate with respect to United."

jurisdictional percentage (44.67%) is added to the local agencies-jurisdictional percentage (9.77%), the total of 54.44% is the amount of United's taxable income derived from regulated activities.

In its response to United's present motion the Commission contends that it "reasonably treated both United and Cities Service Gas Company as wholly regulated for the purpose of the consolidated tax allocation formula." But the Commission further contends that United's direct sales, which are not under either FPC or local jurisdiction, are to a large extent subject to the Commission's certificate jurisdiction with respect to transportation. United responds that its wholly unregulated, wholly uncertificated direct sales amount to at least $29,460,417, more than adequate to absorb the net taxable losses of Union and Overseas totaling $3,893,980.

The Commission's certificate jurisdiction is not the same as its rate jurisdiction and the Commission's argument in this respect is invalid since this is a rate case which we are considering and regulation here is *rate* regulation.

Memphis contends that for purposes of applying the formula as between regulated and nonregulated companies, the Commission was justified in holding United as a whole to be a regulated company because it is engaged in regulated business "to an extent," which justifies the classification; that since the corporate entity is the taxpayer, classification of the entity as a whole in one category is appropriate; and that such classification of United as "regulated" does not mean that tax savings are used only for business under FPC jurisdiction since the FPC's use of its formula allocated United's total cost of service, including the tax allowance, between jurisdictional and nonjurisdictional business.

United contends that if the Commission would correctly apply its tax allocation formula here by dividing United, a mixed company (i.e. one having both regulated and nonregulated income into regulated and unregulated components), the *unregulated* component would be sufficient to absorb all *unregulated* net tax losses (those of Union and Overseas), leaving nothing remaining to be apportioned to regulated companies and regulated components.

The Supreme Court remanded this case because this Court had not addressed itself to United's argument that "the Commission, in applying its tax allowance formula, erroneously failed to recognize and to take account of the fact that United has both jurisdictional and nonjurisdictional activities and income." (87 S. Ct. at 1009.) If the Supreme Court had felt there was no merit in United's argument, it hardly would have been worth while to remand the matter to us for further consideration. The Supreme Court thus recognized that a separation of United's jurisdictional and nonjurisdictional income "might affect the results achieved in application of the Commission's formula." (87 S. Ct. at 1009.)

The Supreme Court recognized in its opinion a fundamental principle of public utility regulatory law when it said: "Ratemaking is, of course subject to the rule that the income and expense of unregulated and regulated activities should be segregated." (87 S. Ct. at 1007.) The Court further said of the FPC-Cities Service formula: "Under its formula, the net losses and net income of unregulated companies are first set off one against the other, and the tax savings made possible by losses of unregulated enterprises are thus first allocated to the unregulated companies. Only if 'unregulated' losses exceed 'unregulated' income is the regulated company deemed to have enjoyed a reduc-

tion in its taxes as a result of the consolidated return." (87 S. Ct. at 1008.)

The fundamental rate-making principle adverted to had heretofore been clearly expressed by the Supreme Court in *Panhandle East. P. L. Co.* v. *Federal Pow. Com'n,* 324 U.S. 635, 641, 65 S. Ct. 821, 825 (1945), when the Court said: "We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act."

The Commission followed the *Panhandle Eastern* principle of separating the regulated and unregulated business for the purpose of allocating costs between jurisdictional and nonjurisdictional sales of United, but ignored it in computing the tax allowance.

As to United's present motion, the Supreme Court must have listened to United's argument for it remanded the case to us to determine whether the tax allocation formula had been erroneously applied to United, which has both jurisdictional and nonjurisdictional activities and income. We look to the commission's *Cities Service* decision itself (30 FPC 158), where the tax allocation formula was conceived, to determine whether there is merit in United's contention.

In the *Cities Service* case, the Commission was determining rates of Cities Service Gas Company in a cost-of-service study in which the single question which remained for decision was whether there had been a proper allowance for federal income taxes in the test period involved. The Gas Company was a

member of the Cities Service system whose parent company, Cities Service Company, through its wholly owned subsidiary, Empire Gas and Fuel Company, owned all the outstanding stock of the Gas Company and altogether, directly or indirectly, owned the stock of thirty-seven corporations. The parent filed a consolidated tax return for a number of years in some of which the Gas Company was included. The parent company allocated the burden of the consolidated tax payments among its various subsidiaries and the regulated companies, such as the Gas Company, were charged 52% (the statutory rate) of their net taxable income while the remainder of the consolidated tax was then allocated among the nonregulated subsidiaries showing a profit in proportion to their respective taxable incomes. Cities Service thus contended that the Gas Company was entitled to an item of expense in the cost of service for federal income tax equal to 52% of its net income. The Commission's staff disagreed and employed a formula for determining the Gas Company's federal income tax in its cost of service which was derived by dividing the consolidated tax paid by the Cities Service system by the total taxable income of all the profitmaking affiliates computed separately for the years involved. Though the Commission's examiner agreed with Cities Service, the Commission itself did not agree with Cities Service, its examiner or its staff. It found the staff's approach to possess "a quality of artificiality and instability which renders it unsatisfactory for ratemaking purposes." (30 FPC at 162.) It said that the basic error in the position of Cities Service is that it claimed an amount of federal income taxes in the Gas Company's cost of service on the basis of a hypothetical figure which the Gas Company would have paid if it were a separate company but which it did not pay because of

its participation in the filing of a consolidated return with its other affiliates, and that to accept the Cities Service position would be to convert a hypothetical tax payment into a prudent operating expense in fixing jurisdictional rates. It said further (30 FPC at 162):

> However, we agree with Cities Service that the fundamental rate making principle governing our disposition of this issue requires a separation between regulated and unregulated costs and revenues. This principle controls our allocation of other costs which are jointly incurred by regulated and unregulated companies, or departments within the same company, and is controlling here. If we were to allocate the consolidated system tax return among all profit companies including those in whole or part engaged in unregulated activities, there would be no sound reason for refusing to fix jurisdictional rates at a level sufficient to make up any real losses these companies might suffer.

Before announcing its tax allocation formula, the Commission said that additionally there was the problem that "There are certain companies in the Cities Service system a portion of whose business is subject to regulation. The taxable income of these companies should first be allocated into regulated and unregulated categories." But it found that Cities Service had failed "to present any evidence upon which to make such an allocation." Nevertheless, it made an appropriate allocation of the regulated and unregulated taxable income of two of the system's mixed companies, Cities Service Oil Company and Cities Service Production Company, based upon evidence presented in another rate case before it, of which it took official notice. Appendix B to its opinion demonstrates how

it treated the regulated portion—which it had calculated—of Cities Service Oil Company. Cities Service Production Company had no taxable income and was not considered, therefore, in the computation of Gas Company's federal income taxes for cost-of-service purposes. Then the Commission said: "Having made these adjustments . . . ." it detailed a formula for federal income tax allocation purposes. (30 FPC at 164.)

In the present case United asks the Commission to apply its formula in the same manner as it did in the *Cities Service* case, that is, to separate the regulated and unregulated components of United as it did the production company affiliates in the Cities Service system.

The Commission's response in opposition to United's motion is that the Commission did not divide or separate the pipe line company,whose rates were being determined, into regulated and unregulated components. We find the reason why it did not stated in its opinion: "Cities Service . . . failed to present any evidence upon which to make such an allocation." (See 30 FPC at 163.)[4]

[4] United contends that the Commission in its petition for certiorari to the Supreme Court in this case conceded that it had not properly applied the Cities Service formula. The Commission responds (p. 9, n. 9) by quoting from its petition the following:

> "There may indeed be problems in the application of the particular formula used by the Commission in this case, a formula which may result in allocating the entire tax saving resulting from losses on unregulated activities to the regulated members of the consolidated group. These problems need not be faced here, however, since, as noted in the text, the disagreement of the court below was not with

Unlike the *Cities Service* case, there is ample evidence of record in the present case by which an allocation may be made and a separation of the regulated and unregulated components of United calculated. If the Commission will make the adjustments in this case which it made in the *Cities Service* case and then apply its formula, having in mind the language of its opinion in that matter that "the fundamental rate making principle govering our disposition of this issue requires a separation between regulated and unregulated costs and revenues," a proper tax allocation for federal income taxes can be made for use in the cost of service of United within the principles determined by the Supreme Court when it reviewed our original decision.[5]

We hold, therefore, that in this case, in making the federal income tax allowance for cost-of-service purposes, the Commission must divide the income of United, a mixed company, into regulated and unregulated components, and offset all unregulated net tax losses against unregulated income. It is apparent that income from the unregulated component of United is

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the details of the allocation method but with the principle that allocation is under any method permissible."

We agree that the Commission did not concede application of the formula but it did note that there might be "problems in the application of the particular formula used by the Commission in this case." Those problems are soluble on a close reading of the Commission's own Cities Service opinion.

[5] The Commission's opinion in the present case (31 FPC 1180 at 1191) indicates that the record would permit an arithmetical allocation of Union's taxable income between its regulated and nonregulated business. However, such allocation was not made because the Commission said it would make no difference because Union has a net taxable loss over the representative period and no part of the consolidated tax would be allocated to it whether it be classified as regulated or nonregulated.

sufficiently large to absorb all such net tax losses [6] and no excess remains to reduce the regulated taxable income of United.

Motion of United for consideration and decision of the issue remanded by the Supreme Court is *Granted.*

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[6] Both the Commission and Memphis dispute that all of the net taxable losses of United and Overseas, totaling the sum of $3,893,980, especially as to Union's losses, were unregulated losses (Commission reply brief p. 9, n. 10), the Commission's brief averring that "Since the Commission concluded that all of the system's income came from the regulated group (United and Corporation), there was no occasion to determine if Union could be divided into regulated and unregulated components within the meaning of the allocation formula."

Memphis in its reply brief (p. 5, n. 3) states: "In any event, the tax loses [i.e. of Union] were not attributable entirely to nonjurisdictional, unregulated oil business." United responds that "There is . . . no real question that these tax losses [i.e. Union and Overseas] arose from non-jurisdictional oil activities."

This is a matter which the Commission should resolve when its final order, consistent with this opinion, is rendered.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 21872

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MEMPHIS LIGHT, GAS & WATER DIVISION, INTERVENOR.

No. 21958

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MEMPHIS LIGHT, GAS & WATER DIVISION, INTERVENOR

Petitions to Review Orders of the Federal Power Commission

Before RIVES, GOLDBERG and AINSWORTH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the motion of petitioner for consideration and decision of the issue remanded by the Supreme Court, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the motion of petitioner for consideration and decision of the issue remanded by the Supreme Court in this cause be, and the same is hereby, Granted, in accordance with the opinion of this Court this day rendered.

JANUARY 10, 1968.

Issued as Mandate: March 15, 1968.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit,
By JACKIE ESPOSITO,
Deputy, March 15, 1968,
New Orleans, Louisiana.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 21872

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
MEMPHIS LIGHT, GAS & WATER DIVISION, INTERVENOR

No. 21958

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
MEMPHIS LIGHT, GAS & WATER DIVISION, INTERVENOR

Petitions for Review of Orders of the Federal Power Commission

ON PETITIONS FOR REHEARING

(March 1, 1968)

Before RIVES, GOLDBERG and AINSWORTH, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that petitions for rehearing of respondent and intervenor in this cause be DENIED.

U.S. GOVERNMENT PRINTING OFFICE: 1968

PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 28 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 248

MEMPHIS LIGHT, GAS AND WATER DIVISION, *Petitioner*

v.

UNITED GAS PIPE LINE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 28, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

MEMPHIS LIGHT, GAS AND WATER DIVISION, *Petitioner*

v.

UNITED GAS PIPE LINE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Memphis Light, Gas and Water Division ("Memphis") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered January 10, 1968[1] (Appendix B to FPC Petition).

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[1] By order of this Court issued May 22, 1968, Memphis' time for filing of a petition for a writ of certiorari was extended to and including June 29, 1968.

OPINIONS BELOW

The Opinion of the Court of Appeals on remand (Appendix A to FPC Petition) is reported at 388 F.2d 385. Its order entered March 1, 1968, denying rehearing is printed as Appendix C to FPC Petition. The opinion and order of the Federal Power Commission ("Commission") are reported at 31 FPC 1180 (II R 32-55; see II R 41-42,[2] 31 FPC at 1190-1191, for the relevant portions). The Commission's decisions on the applications for rehearing are reported at 32 FPC 687, 879, and 1163. The record has been filed in support of the Commission Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals on remand was entered January 10, 1968 (Appendix B to FPC Petition). Memphis invokes the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether United Gas Pipe Line Company ("United") in its application for rehearing alleged as error the Commission's classification of United as a regulated company under the Commission's tax allocation formula as required by Section 19(a) of the Natural Gas Act so as to entitle United to judicial review of that classification under Section 19(b) of the Act.

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[2] Unless otherwise stated, the references are to the record on file with this Court in Nos. 127 and 128, Oct. Term, 1966.

2. Assuming, *arguendo*, an affirmative answer to Question No. 1, was the Commission's inclusion of United in the regulated group of companies correct as a permissible exercise of its expert judgment based on the evidence and the law.

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part:

> "Sec. 4. (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. . . ."
>
> "(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such

rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. . . ."

"Sec. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. *The application for rehearing shall set forth specifically the ground or grounds upon which such application is based.* Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. . . ." (italics supplied)

"(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole

or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. *No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.* The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . ." (italics supplied)

STATEMENT

An aspect of this case, which involves the proper allowance for federal income taxes to be included in United's cost of service in determining just and reasonable rates for its sales of natural gas for resale in interstate commerce, was before this Court in *Federal Power Commission* v. *United Gas Pipe Line Company,* 386 U.S. 237 (1967). At that time, this Court, reversing the United States Court of Appeals for the Fifth Circuit (357 F. 2d 230), (1) upheld the Commission's power to determine United's federal income tax allowance by allocation of the actual taxes paid under a consolidated federal income tax return, in which United is one of the companies filing the return, and (2) held that the formula established and employed by the Commission to accomplish the allocation was neither "erroneous" nor "contrary to its statutory authority" (386 U.S. at 245).

Under the Commission's tax allocation formula, sustained by this Court, the companies participating in the filing of the consolidated return are first grouped

into regulated and unregulated categories.[3] After the companies are grouped in these categories, the net losses and net income of the unregulated group of companies are set off against each other. This has the effect of giving the unregulated group of companies the benefit of the tax savings made possible by the losses of the unregulated companies before the regulated group of companies share in that tax savings. When the combined losses of the unregulated group of companies exceed their combined incomes, the spillover is applied against the respective incomes of the regulated group of companies in proportion to their taxable incomes.

In this case, United, its parent United Gas Corporation, and Union Producing Company,[4] an affiliated gas and oil producer, were included by the Commission in the regulated category, although each of them, in addition to regulated business activities, is engaged in business activities which are completely free of any regulation.

The application of the formula disclosed that, over a representative period of time, United's actual tax lia-

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[3] The "regulated" category, with this Court's approval, includes companies subject to Commission jurisdiction and companies "which are regulated not by it but by state or local authorities". (386 U.S. at 246). "Regulated" and "unregulated" under the tax allocation formula are thus not necessarily synonymous with "jurisdictional", i.e., subject to Commission jurisdiction under the Natural Gas Act, and "non-jurisdictional", i.e., not subject to Commission jurisdiction.

[4] Union Producing Company is United's "producing arm". *Union Producing Co.*, 31 FPC 41, 43 (1964); *Mississippi River Fuel Corp.* v. *FPC*, 252 F. 2d 619, 622-23 (CADC 1957); *Willmut Oil and Gas Co.* v. *FPC*, 299 F. 2d 111 (CADC 1962).

bility, as a result of its participation in the consolidated tax return, equated to an effective tax rate of 50.04 percent of its taxable income—significantly less than the 52 percent tax rate United would have experienced if it had filed a separate tax return. The Commission, therefore, used the effective tax rate of 50.04 percent in determining the federal income tax allowance to be included in United's cost of service for rate-making purposes. Using this rate, the Commission allowed United $9,940,892 for federal income taxes, instead of $12,099,662 claimed by United on the basis of a 52 percent corporate tax rate which it would not actually pay, and allocated this federal income tax allowance between United's jurisdictional and non-jurisdictional business in accordance with the Commission's traditional, judicially-approved, cost allocation procedures that are unchallenged in these proceedings.

In application for rehearing to the Commission, in petition for review to the court below, and in briefs in that court, United challenged only the Commission's power to adopt and apply "to United an effective tax rate resulting from the so-called effect of the consolidated return". (R. 136-7; Exhibit "A" to Petition for Review, R. 159).

United did not challenge the Commission's inclusion of United in the regulated category in the application of the tax allocation formula until the Commission's order was before this Court.

In its brief in this Court, United for the first time contended that the Commission "wrongfully placed" United "all in" the " 'regulated' " category because the Commission "does not regulate United's intrastate business" (Brief of United, Nos. 127 and 128, Oct.

Term, 1966, pp. 30-31). Noting United's contention regarding its own classification, this Court (386 U.S. at 247) deemed "it appropriate for the issue to be raised" in the court of appeals "if the parties are so inclined".

Following issuance of this Court's judgment, United, on April 14, 1967, filed a motion in the court below for consideration and decision of its contention that the Commission erred in placing United in the regulated category and should have divided United into regulated and unregulated categories on the basis of taxable income derived from each category. The motion was opposed by the Commission and Memphis on the grounds that the issue could not be raised by United and considered by the court because it had not been raised in an application for rehearing to the Commission as required by the provisions of Sections 19(a) and (b) of the Natural Gas Act,[5] and that, in any event, the Commission properly included United in the regulated category.

The court below ruled that United's application for rehearing was "sufficiently detailed and specific to permit review by this Court" of the issue raised by United in its motion. In reaching this conclusion, the court below conceded that the "Supreme Court did not specifically pass on the question", but nevertheless, regarded this Court's remand as "a definite indication of its view" that United's contention had been preserved for court review by United as required by the

[5] Section 19(a) provides that the "application for rehearing shall set forth specifically the ground or grounds upon which such application is based". Section 19(b) provides that "No objection to the order of the Commission shall be considered by the court unless there is reasonable ground for failure so to do."

provisions of the Natural Gas Act and should be reviewed on its merits (388 F. 2d at 388).

On the merits of United's contention, the Court of Appeals ruled that the Commission, in the application of its tax allocation formula, must divide the income of a mixed company (such as United) into regulated and unregulated components, and offset all unregulated net tax losses against unregulated income (388 F. 2d at 391); otherwise, the Commission would transgress the "jurisdictional lines which Congress wrote into the Act" (388 F. 2d at 389). The court below also ruled that the Commission may only consider its own rate jurisdiction—not its certificate jurisdiction—in determining a company's appropriate classification for purposes of the tax allocation formula (388 F. 2d at 388).

Timely petitions for rehearing of Memphis and the Commission were denied by the court below on March 1, 1968.

REASONS FOR GRANTING THE WRIT

The ruling of the Court of Appeals that United, as a ground for rehearing, objected with sufficient specificity to the Commission's inclusion of United in the regulated group of companies for purposes of the tax allocation formula, and thereby preserved the issue for court review in compliance with the provisions of Sections 19(a) and (b), *supra*, p. 4, raises a question of importance in the area of judicial review of the Commission's orders and of administrative agency orders generally. Other statutes, including the Federal Power Act (16 U.S.C. 825 *l*(a) and (b)) administered by the Commission, like Section 19(b) of the Natural Gas Act, prohibit judicial consideration of alleged errors

which were not raised before the agency. *Securities Act of 1933,* Section 9(a), 15 U.S.C. 77i(a); *Securities Exchange Act of 1934,* Section 25(a), 15 U.S.C. 78y(a); *Public Utility Holding Company Act,* Section 24, 15 U.S.C. 79x; *National Labor Relations Act,* Section 10 (e), 29 U.S.C. 160(e).[6] The ruling of the court below undermines the requirements of Sections 19(a) and (b) and renders them meaningless and ineffective.

The ruling of the court below—that the Commission in the application of the tax allocation formula should have divided United's taxable income into regulated and unregulated components—is in conflict with this Court's approval of the formula, correctly described by the court below as providing for the grouping of the "*companies*" into "regulated and unregulated groups" (388 F. 2d at 388). The ruling also raises questions of substantial importance with respect to the proper role of the courts on review of the Commission's perform-

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[6] The Natural Gas and Federal Power Acts make an application for rehearing a prerequisite to court review (Sections 19(a) and 313(a)). Accordingly, they provide (Sections 19(b) and 313(b)) that court review is prohibited unless the alleged error has been brought to the Commission's attention in an *application for rehearing.* The other cited statutes do not require an application for rehearing as a prerequisite to court review. They, therefore, require that the alleged error be brought to the agency's attention *during the administrative proceeding.* This is an immaterial difference, for it is judicially established that the requirements for review are satisfied only by an "objection . . . sufficiently specific to apprise the [agency] of the question now presented." *May Stores Co.* v. *NLRB,* 326 U.S. 376, 386, note 5; *Marshall Field & Co.* v. *NLRB,* 318 U.S. 253, 255. This is the express requirement of Section 19(a) of the Natural Gas Act and of Section 313(a) of the Federal Power Act.

ance of its ratemaking responsibilities under the Natural Gas Act and Federal Power Act,[7]

In its earlier review of the orders of the Commission in this case, this Court ruled (*FPC* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 244-245) that a natural gas pipeline company is not entitled to receive in rates a "hypothetical tax expense", i.e., an "expense never in fact incurred", and that it is the "duty of the Commission to limit cost of service to real expense." Yet, if the decision of the court below is permitted to stand, United's consumers, and consumers of natural gas and electric energy, generally, will be required to pay excessive rates because they will be based on "an unreal cost of service" (*FPC* v. *United Gas Pipe Line Co., supra,* at 244). In this case, the decision of the court below imposes a $12,099,662 tax allowance on consumers (computed at a 52 percent tax rate) instead of $9,940,892 (computed at the effective tax rate of 50.04 percent), thereby frustrating the primary aim of the Natural Gas Act "to protect consumers against exploitation at the hands of the natural gas companies." *FPC* v. *Hope Natural Gas Company,* 320 U.S. 591, 610 (1944).

1. A mere reading of United's assignment of error in its application for rehearing to the Commission (Exhibit "A" to Petition for Review, R. 158-9) discloses that United objected to the federal income tax allowance solely on the ground that the use of an effective tax rate, derived from United's participation in a consolidated tax return, instead of the tax rate applicable

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[7] Electric companies subject to the Federal Power Act participate in filing consolidated tax returns and are usually engaged in regulated and unregulated activities.

to a corporation filing a separate tax return, was "beyond the authority of the Commission." [8]

Conceding that "the principal force of United's argument was against the authority of the Commission to adopt a consolidated tax allocation formula", the court below nevertheless ruled that the assignment of error also challenged "the application" of the formula to

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[8] The full text of United's specification of error in its application for rehearing is as follows (Exhibit "A" to Petition for Review, R. 159-60):

> "The Commission erred in adopting and applying to United an effective tax rate resulting from the so-called effect of the consolidated return. This record shows that a consolidated effective tax rate has effect to give gas consumers the benefit of tax deductions from non-utility costs not reflected in the cost of service. Such is beyond the authority of the Commission to accomplish.
>
> "United respectfully says that the Commission further erred in directing the computation of such tax matters in connection with the decision and opinion of the Commission in *Cities Service Gas Company*, 30 FPC —, Opinion No. 396, issued July 15, 1963, in Docket No. G-18799. United shows, as the Commission of course knows, that the Cities Service Opinion is presently pending before the courts for judicial review as to the validity of such directed tax computations and the authority of the Commission so to apply them. United shows that the ultimate final judicial determination on the merits of such issues in the Cities Service case will be dispositive of the Commission's order here and United's exceptions and objections thereto.
>
> "Accordingly, United moves the Commission to supplement and amend Opinion 428 with appropriate provisions authorizing United to use and apply the statutory rate of 52% to United's separately ascertained taxable income pending final determination of the Cities Service case with appropriate provisions for refund upon the basis directed by Opinion 428 should the Commission's opinion in the Cities Service case be upheld and affirmed by the final judicial review and decision of such Cities Service case."

United as a regulated company and was therefore "sufficiently detailed and specific to permit review by this Court." (388 F. 2d at 388.)

For this strained conclusion, the court below leaned on United's use of the word "applying" in the assignment of error and its view that this Court's remand of the case for further proceedings was a "definite indication of" this Court's "view" that the issue was open for court review, although acknowledging that this Court "did not specifically pass on the question." (388 F. 2d at 383). In using the word "applying", contrary to the assumption of the Court of Appeals, United was not thereby objecting to the application of the formula to United as a regulated company. United was objecting only that the Commission had acted beyond its authority in "adopting and applying to United" an effective tax rate of 50.04 percent rather than the 52 percent corporate tax rate in computing United's federal income tax allowance (Exhibit "A" to Petition for Review, R. 159). The power of the Commission to adopt a tax allocotion formula was the *sole* focus of United's objection, not merely the "principal force" of the specification of error, as the court below would have it. Neither in general terms nor with the required specificity of Section 19(a) did United's assignment of error remotely apprise the Commission that United was challenging its inclusion in the regulated category of companies. There was no reference in the assignment of error to United's business activities and there was no claim that United must be divided into regulated and unregulated components. Indeed, the only reference to a business activity was to Union's "tax deductions from non-utility costs" to support United's claim that it was "beyond the authority of the Commission"

to "give gas consumers the benefit" of these tax deductions by using "an effective tax rate resulting from the so-called effect of the consolidated return." (Exhibit "A" to Petition for Review, R. 159), a contention expressly rejected by this Court (386 U.S. at 243-244).

Petitioner's reading of United's assignment of error finds substantial support in the fact that in extensive main and reply briefs filed by United in the Court of Appeals on the first review of the Commission's orders in this case, United neither argued nor even hinted that United was erroneously classified by the Commission under the formula. In accord with its assignment of error, in application for rehearing (Exhibit "A" to Petition for Review, R. 159-60) and in petition for review (R. 136-7), United devoted its entire argument to the proposition that the Commission's approach to the tax allowance was beyond its power and transgressed the jurisdictional limits imposed upon the Commission by Congress in the Natural Gas Act. It is not likely that United would have remained silent on the question of classification if, in fact, it had been assigned as error.[9]

The court below also erred in regarding the remand for further proceedings as "a definite indication" by this Court "of its view" that the issue of United's classification had been preserved for judicial review. Although conceding that this Court did not pass on the

[9] Even in its brief opposing the petitions for writs of certiorari (Nos. 1301 and 1302, Oct. Term, 1965), United argued only that the Commission's effective tax rate approach was beyond its authority. Apparently, by the time United came to its brief on the merits, following the granting of certiorari, United's confidence in its position must have been shaken, for the untimely assignment of error on brief was an obvious effort to hedge its position.

procedural question (388 F. 2d at 388), the court below found it "difficult to believe that the Supreme Court would have remanded this case to us for further proceedings if the Commission and Memphis are correct in their opposition to the motion on this ground" (388 F. 2d at 388).

There is no difficulty, however, about a remand for further proceedings even where judicial review of the issue may be foreclosed. On remand, the further proceedings would include, as in fact they did in this case, consideration first of the right to judicial review and then, if the right to review were sustained, consideration of the merits of the substantive issue.

On the facts of this case, there is no basis for the lower court's conclusion that this Court's remand indicated a view that the substantive issue had been properly preserved for judicial review. The procedural question was not presented, briefed, or argued to this Court in the earlier round. United's application for rehearing was not printed and the assignment of error here involved received no attention. In stating that it was "appropriate for the issue to be raised" in the court below "if the parties are so inclined" (386 U.S. at 247), this Court, we submit, was expressing no view either on the availability of the issue for judicial review or on the merits of the issue.[10]

The requirements of Section 19(a) are not merely technical, as the court below appears to have believed

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[10] The court below also regarded the remand as indicating this Court's feeling that United's contention, with respect to its classification for purposes of the tax allocation formula, had merit (388 F. 2d at 389). It is abundantly clear, however, that this Court refrained from expressing a view on the issue "to which the Court of Appeals has not addressed itself" (386 U.S. at 247).

(388 F. 2d at 388). This Court has emphasized in passing on the Section 19 requirements that "... orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500. The requirement has been rigorously enforced by the courts. *Ibid.*; *Wisconsin* v. *FPC*, 373 U.S. 294, 307.

This Court in *Colorado Interstate*, in language that is particularly appropriate to the circumstances of this case, said (348 U.S. at 501)—

> "The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges. The Federal Power Commission is a legislative agency the decisions of which involve these difficult problems of policy, accounting, economics and special knowledge that go into public utility rate making. For reviewing a rate made by the Federal Power Commission, the Court of Appeals has no inherent suitability comparable to that which it has for reviewing the judicial decisions made by a United States District Court." [11]

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[11] In *Colorado Interstate*, the natural gas pipeline company objected in its application for rehearing to an allocation method as not proper, but on review it claimed that its objection went to the validity of a merger condition which required the allocation. The Supreme Court ruled that the objection did not meet the Section 19 requirements in that it gave the Commission no notice that the company was attacking the validity of the merger condition. Here, United objected only to the Commission's power to adopt a tax allocation formula. It gave no notice to the Commission that its inclusion of United in the regulated category was under attack and afforded the Commission no opportunity to deal with the attack.

2. Assuming, *arguendo,* that judicial review was not foreclosed, the court of appeals erred in ruling that the Commission in computing United's federal income tax allowance under the tax formula must divide United into regulated and unregulated categories on the basis of its taxable income from each category, to avoid transgression of the Congressional limitation of the Commission's jurisdiction to interstate sales and transportation of natural gas under the Act (388 F. 2d at 389).

The court of appeals' ruling imposes a modification of the formula that is not required and conflicts with this Court's approval of the formula in *FPC* v. *United Gas Pipe Line Company, supra.* This Court has held that the tax formula, which provides for classification of the *companies*[12]—the tax paying entities—into regulated and unregulated groups, does "not exceed the powers granted to it by Congress" (386 U.S. at 243), and does not offend the requirement for separation of costs between jurisdictional and non-jurisdictional business (386 U.S. at 244-245). Referring specifically to United, this Court held that the Commission did *not* violate "the rule that the income and expense of regulated and unregulated activities should be segregated" in "arriving at the net taxable income of United" or *"in determining the tax allowance"* (386 U.S. at 243; italics supplied).

The court of appeals erred because it did not understand the function of the Commission's tax allocation formula. Its function is to apportion an equitable share of the consolidated tax among the regulated and unregulated businesses. After this apportionment the

[12] Under the ruling of the court of appeals, United's tax liability on its jurisdictional and non-jurisdictional pipeline business would be computed at different rates, a result at war with fact and reality.

allocation of that share between jurisdictional and nonjurisdictional business of the company takes place as a separate step.

Having determined United's share of the consolidated tax, the Commission, as it did with respect to all of United's total costs of service, allocated the tax and other costs of United between jurisdictional and nonjurisdictional business in accordance with its traditional allocation procedures which have received judicial sanction (388 F. 2d at 389). There was, therefore, no violation by the Commission of the Act's jurisdictional limitations in the computation of United's tax liability. The Commission recognized and took account of the fact "that United has both jurisdictional and nonjurisdictional activities and income." (386 U.S. at 247).

The ruling of the court below was also based on a misunderstanding of the Commission's decision in the *Cities Service Gas Company* case, 30 FPC 158, in which the formula, as approved by this Court, was conceived and applied. To determine "whether there is merit in United's contention", the court of appeals looked "to the commission's *Cities Service* decision itself. . ." (388 F. 2d at 389). Looking to the *Cities Service* decision, the court found that the formula was applied to the pipeline company whose rates were there being determined, Cities Service Gas Company, in precisely the same way that it was applied to United, the pipeline company in this case. Cities Service Gas Company was included in the regulated group of companies, although like United, it was only partially regulated by the Commission and made substantial sales of natural gas which were not regulated by the Commission or by state or local authorities (30 FPC at 181). On the court's own premise, therefore, the Commission's appli-

cation of the formula to United should have been affirmed.

But the court sought to distinguish the cases on the ground that Cities Service Gas Company was not divided "into regulated and unregulated components" because it had presented no evidence upon which such an allocation could be made, whereas "there is ample evidence of record in the present case by which an allocation may be made and a separation of the regulated and unregulated components of United calculated" (388 F. 2d at 391).

For this distinction, which does not exist, the court below relied on the following statement in the Commission's *Cities Service* opinion: "Cities Service . . . failed to present any evidence upon which to make such an allocation." (30 FPC at 163). But this statement, contrary to the assumption of the court below, did not refer to evidence upon which an allocation of Cities Service Gas Company itself could be made. The Commission was referring to the failure of Cities Service Gas Company to present such evidence for two oil and gas producing affiliates, Cities Service Oil Company and Cities Service Production Company (30 FPC at 163).

The fact is that the record in the *Cities Service* case, *supra,* as does the record in every rate proceeding in which a natural gas pipeline company's rates are being fixed, contained the same type of data respecting Cities Service Gas Company that the court of appeals deemed sufficient to divide United into regulated and unregulated activities and income. And on the basis of such data, the Commission separated Cities Service Gas Company's total cost of service, including its share of the consolidated tax liability, between jurisdictional and non-jurisdictional business.

Finally, the court of appeals exceeded its "essentially narrow and circumscribed" review authority in failing to sustain the Commission's inclusion of United in the regulated group of companies on the basis of its finding (II R 41) that "United is largely a regulated company" and should be designated "as such for the purpose of these (tax) computations" (material in parenthesis supplied). The finding was supported by substantial evidence and represented an informed judgment in an area in which the Commission has expertise. *Permian Basin Area Rate Cases,* U.S. , 36 LW 4337, 4341 (1968); *Hardin* v. *Kentucky Utilities Co.,* U.S. , 36 LW 4134, 4136 (1968); *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 589 (1945); *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944).

The evidence disclosed that at least 54.44 percent of United's revenues are derived from sales of natural gas which are subject to rate regulation by the Commission and other authorities. An additional portion of United's revenues are derived from sales which involve the use of facilities that are certificated by the Commission because the sales involve transportation of natural gas in interstate commerce, although the rates at which such sales are made are not regulated by the Commission.

The court below ruled that the Commission may not consider its certificate jurisdiction in separating companies under the formula into regulated and non regulated categories. (388 F. 2d at 388.)

The Commission's finding was supported by the 54.44 percent of regulated revenues alone. Additionally, however, the ruling of the court below on certificate jurisdiction is erroneous and runs afoul of this Court's decision in *FPC* v. *United Gas Pipe Line Co., supra.*

As used in the formula, a "regulated" company may be a company which is regulated only "by state or local authorities" (386 U.S. at 246), and as so construed, the formula was approved by this Court.

Since the Commission may rely on regulation by State and local authorities to include a company in the regulated category—even where there may be no Commission rate regulation of that company at all—the ruling of the court below conflicts with this Court's approval of the formula and is neither rational nor logical. Moreover, the investment in, and operating costs of, certificated facilities from which non-FPC regulated sales are made, have a distinct relationship to the Commission's rate jurisdiction. They affect and enter into the cost of service, and ultimately the rates, that are subject to Commission jurisdiction.[13]

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[13] For this reason, applications for authority to construct and operate facilities for the transportation of natural gas in interstate commerce, whether or not the sales from such facilities are subject to Commission jurisdiction, are required to include data showing the effect on systemwide operating revenues and expenses of the estimated revenues and expenses related to the proposed facilities. *FPC Regulations Under the Natural Gas Act, Section 157.14(16)*. When the proposed facilities will result in a material change in the applicant's average cost of service, the applicant must also present a cost of service for the system reflecting the operation of the proposed facilities together with an allocation of such costs to each particular service classification. *Id., Section 157.14(18)(ii)(a) and (b)*. Cf. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646-647 (1945), in which this Court, citing Section 5(a) of the Act, held that the "Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes rates for interstate wholesale sales which are subject to its jurisdiction" in order that the Commission may assure that the business subject to its jurisdiction is not being saddled with costs that should be borne by the unregulated business.

The mistakes made by the court of appeals in this case emphasize the wisdom of the requirement of the Natural Gas Act that alleged errors must first be presented to the Commission.

CONCLUSION

This petition for a writ of certiorari should be granted and the judgment of the court below reversed without further briefs or argument since the decision of the court below is so clearly contrary to, and in conflict with, the evidence and decisions of this Court on the questions presented.

Respectfully submitted,

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No. 248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FEDERAL POWER COMMISSION,
Petitioner,

v.

UNITED GAS PIPE LINE COMPANY
Respondent.

MEMPHIS LIGHT, GAS AND WATER DIVISION,
Petitioner,

v.

UNITED GAS PIPE LINE COMPANY,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 247
No. 248

IN THE

Supreme Court of the United States

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BRIEF FOR RESPONDENT IN OPPOSITION

To The Honorable Supreme Court of the United States:

Respondent, United Gas Pipe Line Company, files this Brief in Opposition to the Petitions for Writ of Certiorari filed by the Federal Power Commission and by Memphis Light, Gas and Water Division to review the judgment of the United States Court of Appeals for the Fifth Circuit (388 F.2d 385) entered January 10, 1968 in connection with its decision of the issue remanded by this Court in *Federal Power Commission* v. *United Gas Pipe Line Co.*, 386 U.S. 237.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that United's petition for rehearing to the Commission was "sufficiently detailed and specific" to preserve for appellate review under Section 19(b) of the Natural Gas Act the remanded issue of whether "the Commission, in applying its tax allowance formula, erroneously failed to recognize and to take account of the fact that United has both jurisdictional and non-jurisdictional activities and income"?

2. Whether upon application of the tax allowance formula the Commission failed to make a separation of United's jurisdictional and non-jurisdictional activities and income and to offset non-jurisdictional losses against non-jurisdictional income?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act appear in the Commission's petition at pp. 3-5.

STATEMENT

This is the second time this case has been before the Court. The relevant background facts are set forth in *Federal Power Commission* v. *United Gas Pipe Line Company*, 386 U.S. 237, and need not be repeated here. In its prior opinion, this Court held that the Commission did not exceed its statutory powers when it determined the income tax allowance in a pipeline company's cost of service for ratemaking purposes by using the actual consolidated tax paid by the pipeline and its affiliated companies. In particular, the Court approved the "tax allowance formula" which the Commission had devised in *Cities Service Gas Co.*, 30 FPC 158 for determining the proper allowance for federal income taxes to be included in a

pipeline company's cost of service where the pipeline has joined affiliated companies in filing consolidated federal income tax returns.[1] However, the Court reiterated that "Ratemaking is, of course, subject to the rule that the income and expenses of unregulated and regulated activities should be segregated" (386 U.S. at 243). In this connection the Court pointed out that under the Commission's tax allowance formula unregulated losses must be first set off against unregulated income so that "Only if 'unregulated' losses exceed 'unregulated' income is the regulated company deemed to have enjoyed a reduction in its taxes as a result of the consolidated return." (386 U.S. at 245). Having sustained and construed the Commission's formula, the Court remanded the case for the Court of Appeals to decide whether the Commission had properly applied its formula, stating:

> "It is said here that the Commission, in applying its tax allowance formula, erroneously failed to recognize and to take account of the fact that United has both jurisdictional and non-jurisdictional activities and income. Although this is a matter which might affect the results achieved in application of the Commission's formula, it is one to which the Court of Appeals has not addressed itself, and we think it appropriate for the issue to be raised there if the parties are so inclined." (386 U.S. at 247).

On remand, the Court of Appeals found that the Commission had not properly applied its tax allowance formula. In a thorough opinion, the court considered and correctly disposed of the arguments now urged by the Commission

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[1] In that case, the Commission stated that the companies joining in a consolidated tax should be divided into "regulated" and "unregulated" groups, and certain of those companies should be further divided into regulated and unregulated parts, because such companies actually conducted both types of operations.

and Memphis in support of their petitions for certiorari. By reference to specific language in United's petition for rehearing to the Commission, the court found that United's challenge of the application for the Commission's tax allowance formula was "sufficiently detailed and specific to permit review" under Section 19(b) and noted that to hold otherwise "would make pleading an end unto itself" (388 F.2d at 388). Further, it was noted that the issue of the proper application of the Commission's consolidated tax allocation formula was remanded for decision despite the fact that during oral argument before this Court, the Commission had claimed that such issue was not open for review because it was not raised in United's petition for rehearing. As to the remanded issue, the Court of Appeals found that in applying the tax allowance formula for computing United's tax allowance the Commission had failed to make a separation between regulated and non-regulated costs and revenues. The Court pointed out that such separation was a fundamental ratemaking principle which had been recognized in *Panhandle East. P. L. Co.* v. *Federal Pow. Com'n.*, 324 U.S. 635[2] and reaffirmed by this Court in its opinion in this case. The Court of Appeals also noted that paradoxically the Commission had followed the principle of separation "for the purpose of allocating costs between jurisdictional and non-jurisdictional sales of United, but ignored it in computing its tax allowance" (388 F.2d at 389).

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[2] In *Panhandle Eastern P. L. Co.* v. *Federal Pow. Com'n.*, the Court stated (324 U.S. at 641):

> "We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rate of a company whose activities embrace both. Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act."

The Court of Appeals held that in order to recognize and take account of United's jurisdictional and non-jurisdictional activities and income the Commission should have made a separation of the regulated and unregulated components of United as it did with respect to the production company affiliates in the *Cities Service* case. The court stated if such a separation were made, ". . . a proper tax allocation for federal income taxes can be made for use in the cost of service of United within the principles determined by the Supreme Court when it reviewed our original decision." (388 F.2d at 391). It found that there was ample evidence of record by which such a separation could be made and that the separation would affect the results achieved in application of the tax allowance formula as this Court had predicted it might. Accordingly, the Court of Appeals remanded the case to the Commission with instructions to recompute United's federal income tax allowance by dividing the income of United into regulated and unregulated components and offsetting all unregulated tax losses against unregulated income. It also pointed out that there was a dispute as to the appropriate amount of unregulated tax losses since Petitioners contended that the tax losses of certain of United's affiliates were not entirely attributable to non-jurisdictional business.[3] The court stated that "This is a matter which the Commission should resolve when its final order, consistent with this opinion, is rendered." (388 F.2d at 392, fn. 6).

REASONS FOR DENYING THE WRIT

1. The two issues raised in the petitions in this case are *sui generis* to United and the facts of this case. Neither issue has any general applicability or importance beyond the context of this case. The first issue concerns Petitioners'

[3] See 388 F.2d at 391, fn. 6.

claim that the issue remanded by this Court is not open for decision because the issue was not adequately preserved for appellate review in United's petition for rehearing to the Commission. This claim necessitated a determination by the Court of Appeals of the meaning and sufficiency of United's specification of error. In concluding that the issue of the proper application of the Commission's consolidated tax allowance formula was raised in United's petition for rehearing, the court referred to pertinent parts thereof and concluded that they "were sufficiently detailed and specific to permit review" under Section 19(b).[4] The sole effect of the court's determination was to permit United to seek review of the remanded issue. Obviously any determination of the sufficiency or insufficiency of United's specification of error is peculiar to this case. It is patently absurd for the Commission to argue that the meaning of particular language used by United in its petition for rehearing "is important in the administration of natural gas regulation" or that it will have "substantial impact for the conduct of business by federal regulatory agencies." (Com. Pet. pp. 19 and 25).

The second issue likewise has limited application. The Court of Appeals determined that the Commission erred in applying its tax allowance formula in computing federal income taxes to be included in United's cost of service. This determination was predicated solely upon the facts of this case and correspondingly the significance and impact of such determination is confined solely to this case.

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[4] Under Section 19(b) all matters logically and reasonably connected with the language employed in a petition for rehearing before the Commission may be reviewed by the appellate court. *Nat. Gas Pipeline Co.* v. *FPC* (7 Cir. 1941) 120 F.2d 625, rev'd on other grounds (1942) 315 U.S. 575; *Nat. Gas Pipeline Co.* v. *FPC* (3 Cir. 1958) 253 F.2d 3, cert. den. (1953) 357 U.S. 925; *California* v. *FPC* (9 Cir. 1965) 353 F.2d 16; *Public Utility District No. 1* v. *FPC* (9 Cir. 1957) 242 F.2d 672.

However, the Commission contends that the decision of the Court of Appeals "creates continuing uncertainty as to the validity and utility of the formula this Court approved before remanding the case to the Fifth Circuit" (Com. Pet. p. 14). Evidently the Commission has failed or refused to understand what the Court of Appeals did before remanding the case for the Commission to make further factual determinations. The court below did not change the Commission's tax allowance formula; it did not enunciate any new legal or regulatory principles of law. Instead, the court carefully followed the prior decision of this Court. The Court of Appeals recognized fully this Court's approval of the Commission's formula, and it did no more than review the application made of the formula to United in light of the interpretation made by this Court that application of the formula includes separation of regulated and unregulated activities and income. This principle of separation is not new. It had been recognized by this Court as early as 1945[5] and was expressly reaffirmed by this Court's prior decision in this case (386 U.S. at 243). In holding that the Commission erred in applying its tax allowance because no separation of United's regulated and unregulated activities and income had been made, the Court of Appeals did nothing more than require the Commission to apply its formula "within the principles determined by the Supreme Court when it reviewed our original decision." (388 F.2d at 391). The Commission also asserts that the "same question" of the proper application of its tax allowance formula may arise in any rate-making proceeding involving pipelines which participate in consolidated tax returns, and also in the determination of rates of electric companies under the Federal Power Act (Com. Pet. p. 25).

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[5] *Panhandle East. P. L. Co.* v. *Federal Pow. Com'n.*, 324 U.S. 635 (1945).

If this is true, it is not because of the decision of the Court of Appeals on the remanded issue in this case, but because the separation of regulated and unregulated activities and income is fundamental to the determination of rates for any utility. In its original opinion in this case, this Court pointed out that all facets of ratemaking, not just the computation of income taxes, were "subject to the rule that the income and expense of unregulated and regulated activities should be segregated" (386 U.S. 243). Whether an application of the Commission's tax allowance formula comports with this rule will necessarily depend on the facts of each case. The fact that the Court of Appeals held that the Commission's application of its formula to United failed to follow the rule does not portend that the Commission or other regulatory bodies will likewise fail to make a separation between regulated and unregulated costs and revenues in future cases under entirely different facts and circumstances.

2. The petitions should not be granted because there are unanswered factual determinations to be made by the Commission pursuant to the remand of the Court of Appeals. In calculating United's federal income tax allowance on remand the court held that the Commission is to (1) "divide the income of United, a mixed company, into regulated and unregulated components," (2) "offset all unregulated net tax losses against unregulated income," and (3) determine if any portion of the net taxable losses ($3,893,980) of United's affiliates[6] is attributable to their regulated activities. The Court of Appeals correctly determined, and apparently Petitioners do not dispute, that the evidence of record permits the separation of United's jurisdictional and non-jurisdictional activites and income

[6] Union Producing Company and United Overseas Production Corporation.

and the offsetting of non-jurisdictional losses against non-jurisdictional income. However, it appears that additional evidence may be required in connection with Petitioners' contention that a portion of the losses of United's affiliates are attributable to regulated activities. Upon making these factual determinations the Commission will be able to ascertain "what portion of the single consolidated tax liability belonged to United" (386 U.S. at 243). Until these factual determinations have been made by the Commission, the results achieved by application of the Commission's formula pursuant to the remand of the court below are unknown.[7] Accordingly, review by this Court is decidedly premature. In effect, at present there is no final order for this Court to review.

3. The Court of Appeals was clearly correct in finding that the Commission had not properly applied its tax allowance formula. Indeed, the Commission admitted to this Court that it may not have properly applied its formula. Thus, in its original petition for certiorari in this case the Commission stated:[8]

> "There may indeed be problems in the application of the particular formula used by the Commission in this case, a formula which may result in allocating the entire tax saving resulting from losses on unregulated activities to the regulated members of the consolidated group."

It is undisputed that in applying its tax allowance formula the Commission did not make a separation of the regulated

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[7] Although the Court of Appeals noted that it is apparent the income from the unregulated component of United was sufficiently large to absorb all unregulated tax losses, it did not attempt to apply the Commission's tax allowance formula but remanded with instructions for the Commission to make the the required factual determinations.

[8] See 388 F.2d at 391, fn. 4.

and unregulated components of United[9] It was for this reason that this Court, after sustaining the Commission's authority to adopt a consolidated tax allocation formula, remanded the case with instructions for the Court of Appeals to determine whether "the Commission, in applying its tax allowance formula, had erroneously failed to recognize and to take account of the fact that United has both jurisdictional and non-jurisdictional activities and income." (386 U.S. at 247). On remand, the Court of Appeals found that the Commission had not made a separation of United's jurisdictional and non-jurisdictional activities and income in the application of the tax allowance formula which this Court had approved. In directing the Commission to make such a separation, the Court of Appeals was merely following the interpretation this Court had placed on the application of the formula in its earlier opinion that: "Ratemaking is, of course, subject to the rule that the income and expense of unregulated and regulated activities should be segregated." (386 U.S. at 243). Such separation is consistent with and, in fact, is required by this Court's *Panhandle Eastern* decision, *supra*,[10] and by the Commission in the *Cities Service* case, where in promulgating the tax allowance formula it stated (30 FPC at 162):

> "However, we agree with Cities Service that the fundamental rate making principle governing our dis-

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[9] In Opinion 428 the Commission states (II R 41): "United is largely a regulated company, and we shall designate it as such for the purposes of these computations."

[10] Petitioners can find no way around the requirement of separation under the *Panhandle Eastern* decision. Therefore, they assert it was "at the heart of the Tenth Circuit's decision that held the *Cities Service* formula invalid" and in deciding the instant case, this Court "rejected that view" (Com. Pet. p. 24). Contrary to Petitioners, this Court did not impliedly overrule *Panhandle*, but relied on it to "support the power and the duty of the Commission to limit cost of service to real expenses" (386 U.S. at 242).

position of this issue requires a separation between regulated and unregulated costs and revenues. *This principle controls our allocation of other costs which are jointly incurred by regulated and unregulated companies, or departments within the same company, and is controlling here.* If we were to allocate the consolidated system tax return among all profit companies including those in whole or part engaged in unregulated activities, there would be no sound reason for refusing to fix jurisdictional rates at a level sufficient to make up any real losses these companies might suffer." (Emphasis supplied).

4. Petitioners do not challenge the validity of the separation principle but advance several arguments why it should not be applied in computing United's allowance. First, they contend that separation should not be required in this case because the Commission did not make a separation of the regulated and unregulated components of Cities Service Gas Company in the very proceeding in which the tax allowance formula was devised. However, this argument is an obvious non sequitur because *application* of the formula in *Cities Service* is not dispostive of the manner in which the Commission's tax allowance formula should be applied to United. Further, in the *Cities Service* case the Commission made a separation of the taxable income of two producing affiliates[11] of Cities Service Gas Company. In the same vein Petitioners argue that a separation of Cities Service Gas Company could have been made because the record in the *Cities Service* case contained the same data on which the Commission has been directed to make a separation of United's jurisdictional and non-jurisdictional activities and income. This argu-

[11] Cities Service Oil Company and Cities Service Production Company, both of which make sales of natural gas in interstate commerce and, therefore, are classified as "natural gas companies" under the Natural Gas Act.

ment is difficult to reconcile with the statement in the Commission's decision that "Cities Service . . . failed to present any evidence upon which to make such an allocation." (30 FPC at 163). In this connection it is significant that the revenue figures for Cities Service Gas Company quoted in the Commission's brief (p. 20) are from a source other than the record in that case. Further, the existence or non-existence of certain data in the *Cities Service* record in no way explains why the principle of separation should not be applied in this case.

Petitioners also assert that United's non-jurisdictional income is to a large extent derived from direct interstate sales of gas to industrial users. While they admit these sales are not "directly within the Commission's ratemaking jurisdiction," they contend that the interstate transportation of gas for such sales is subject to the Commission's certificate jurisdiction and therefore interstate industrial sales should be considered in the "regulated" category and not in the "unregulated" category which the Court of Appeals accepted (Com. Pet. pp. 22-23). The Court of Appeals correctly rejected this argument saying "certificate jurisdiction is not the same as . . . rate jurisdiction . . . and regulation here is *rate* regulation." (at 388 F. 2d at 388).[12] Moreover, 27.98% of United's taxable income during the period in question ($29,460,417), was from wholly uncertificated, wholly unregulated activities, more than enough to absorb the unregulated tax losses ($3,893,980) of United's affiliates (388 F. 2d at 388).

The Commission further contends that the required separation of the regulated and unregulated components of

[12] Even if the Commission were correct, the remand required by the Court of Appeals would still be necessary in order to make a separation of United's other non-jurisdictional income and activities.

United is at odds with its "discretionary" authority to adopt a formula that allocates tax liability. (Com. Pet. p. 24). However, nothing in the decisions of this Court or of the Court of Appeals on remand denies the Commission's authority to adopt such a formula. What these decisions say is that, in applying the formula which was adopted, the Commission is required to separate jurisdictional and non-jurisdictional activities and income. This is exactly how the Commission told the Court of Appeals for the Tenth Circuit the tax allowance formula would be applied. In its brief to that court upon appeal in the *Cities Service* case, the Commission said:

> "Concluding that a system of several affiliated corporations filing a consolidated return is in essentially the same position as if it were such a single corporation, the Commission overruled its staff's contentions that no distinction should be made between regulated and unregulated components of the system. It held instead that all of the unregulated corporations (together with the unregulated *portions of regulated companies*) should have their profits and losses netted before *any net* was allocated to the regulated corporation's business (*or regulated portions*)." (p. 9, FPC Brief, No. 7538 USCA 10 Cir, *Cities Service Gas Company, et al vs. FPC* dated March 23, 1964) Emphasis added.

Thus this Court's prior decision and remand, the Court of Appeals' decision on remand, and the Commission's representation to the Tenth Circuit are in accord in requiring separation in the application of the formula to United. Of course, the Commission does not have "discretion" to ignore this fundamental ratemaking principle in the application of its formula.

Finally, Petitioners fall back on the argument that if the required separation is made the consuming public will be required to pay excessive rates because United's tax allowance will be increased over the tax allowance originally calculated by the Commission[13] although United will not incur an equivalent out-of-pocket expense.[14] The fatal defect in these bootstrap arguments is that they obviously assume the answer they seek to justify, i.e., assume that the tax allowance resulting from the Commission's original allocation was lawful and equitable and that any higher tax allowance is excessive. The very reason for requiring separation of regulated and unregulated components of a company when fixing its rates is to make certain that costs and revenues are correctly assigned or equitably apportioned and that each component "bears its just share of corporate costs *but no more*" (Com. Pet. p. 24). Unless such separation is made "the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business," and vice-versa. *Panhandle East. P. L. Co.* v. *Federal Pow. Com'n., supra.* Therefore, in this case a separation of United's jurisdictional and non-jurisdictional activities and income is necessary to insure an equitable allocation of the consolidated taxes paid by United and affiliated companies.

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[13] The amount of the alleged increase is not clear and will have to await the factual determinations to be made by the Commission on remand. The Commission contends that United's rates will be increased by more than $250,000 per year (Com. Pet. p. 24).

[14] Com. Pet. pp. 24-25, Memphis Pet. p. 11.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, David T. Searls, one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of August, 1968, I served copies of the foregoing Brief for Respondent in Opposition by mailing copies thereof to counsel for the Federal Power Commission and for Memphis Light, Gas and Water Division, Petitioners in Nos. 247 and 248, respectively.

.....

DAVID T. SEARLS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 248

MEMPHIS LIGHT, GAS AND WATER DIVISION,
Petitioner

v.

UNITED GAS PIPE LINE COMPANY

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 248

MEMPHIS LIGHT, GAS AND WATER DIVISION,
Petitioner

v.

UNITED GAS PIPE LINE COMPANY

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

I.

United Gas Pipe Line Company ("United") has made no effort, in its brief in opposition, to show that its application for rehearing preserved for court review the Commission's inclusion of United in the regulated category of companies under the Commission's tax allocation formula. It could not do so successfully. United only asserts that the ruling of the court below that United did preserve the issue, if error, is not the kind of error that should concern this Court because the error is "*sui generis* to United and the facts of this case", involving only determination of "the sufficiency or insufficiency of United's specification of error" (Br. in Opp., pp. 5, 6).

But more is involved. At stake, in the ruling of the court below, is the statutory plan for the orderly disposition of issues by the Commission and their review by the courts. In adopting its tortured reading of United's assignment of error, the court below, contrary to decisions of this Court, rested on its interpretation of the requirements of Section 19 of the Natural Gas Act as merely technical, which, if adhered to, would make "pleading an end unto itself" (388 F.2d at 388).

The Section 19 requirements are not technical. Their obvious purpose is to enable the Commission in the first instance to know the specific objection and to enter an order responsive thereto prior to its presentation to the court, thereby providing a basis for judicial review of the Commission's action on the objection.[1]

This case presents a classic example of what the requirements of Section 19 were intended to prevent. The Commission was never given notice by United of the objection it is pressing in the courts and the Commission has, therefore, never been given the opportunity to enter a responsive order. Nevertheless, without the benefit of a Commission order on the objection, the court below, instead of limiting its role to that of review, has assumed the Commission's role and substituted its judgment for the Commission's on the requirements and application of the tax allocation formula.

The error of the court below is, therefore, not *sui generis* and limited to the facts of this case. The error involves and challenges the continued effectiveness of the statutory allocation of duties and responsibilities between the Commission and the courts.

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[1] The cases cited by United in note 4, page 6, of its brief in opposition do not aid United. In those cases, the objections had been expressly raised in the applications for rehearing and had been the subject of Commission orders.

II.

United misrepresents Petitioner's position, on the Commission's inclusion of United in the regulated category of companies under the tax allocation formula, by characterizing it as an argument that the "separation principle" of the *Panhandle* case (*Panhandle Eastern P.L. Co. v. FPC*, 324 U.S. 635, 641) should not be applied with respect to United's tax allowance (Br. in Opp., p. 11).

The undisputed fact is that the Commission, in accordance with the "separation principle" of the *Panhandle* case, utilizing its traditional, judicially-approved, cost allocation principles, did allocate United's cost of service, including the federal income tax component between jurisdictional and non-jurisdictional business. No one has questioned that allocation at any phase of this case. This case, therefore, contrary to the ruling of the court below and to United's brief in opposition, does not involve and does not offend the "separation principle".

Under the Commission's tax allocation formula, the participants in the consolidated tax return are first separated into "regulated" and "unregulated" groups.[2] The purpose of this classfication is to determine the portion of the total consolidated tax that should be assigned to the "regulated" group for apportionment among each member of the "regulated" group. The Commission placed United in the "regulated" group. It made no error in thus applying the tax allocation formula, which this Court has already approved and has held does not violate the "separation principle". The

[2]United and the court below confuse this "regulated" and "unregulated" classification, as used in the tax allocation formula, with "jurisdictional" and "non-jurisdictional", and use them interchangeably. This leads to the confusion in United's brief in opposition and undoubtedly led the court below into its error. "Regulated" under the tax formula includes sales that are subject to any regulation, be it federal, state, or municipal, whereas "jurisdictional" refers only to sales that are subject to Commission jurisdiction. This distinction must be kept in mind.

court of appeals ruled that the Commission did not apply the tax allocation formula correctly to United in deriving United's share of the consolidated tax. The court overlooked the fact that the rate-making process provides for United's share of the tax to be allocated between jurisdictional and non-jurisdictional business.

On the erroneous belief that the "separation principle" of *Panhandle* had been violated, the court below imposed a revision of the formula that would make it *impossible* for the Commission to compute a federal income tax cost for the company as a whole which would then be allocated between jurisdictional and non-jurisdictional business. This revision of the formula would be of general application and would not be limited to the facts of this case. The court's formula would require the Commission to separate the company's income tax *first* between "regulated" and "unregulated" activities—*then* again allocate the "regulated" portion of the tax cost between "jurisdictional" and "non-jurisdictional" business of United.

As a practical matter the ruling below leaves the Commission powerless to require that the consumers of United's gas benefit from the fact that the corporation as a whole experienced an effective tax rate of 50.04% instead of 52%. The court assigned all of the deductions generated by the "unregulated net tax losses" of the other corporations in the consolidated group against a *portion* of United's income. The ruling of the court below flies in the face of the realities of the situation and deprives the Commission of the power to include in cost of service only expenses actually incurred. It also would create without justification a priority for a segment of the company's activities which this Court has rejected, saying (386 U.S. at 246):

> "The Commission's formula, of course, prefers neither concern but allocates the tax liability equitably between each regulated member, without regard to the source of the regulation."

III.

United argues that review by this Court is premature because "there are unanswered factual determinations to be made by the Commission pursuant to the remand of the Court of Appeals" (Br. in Opp., pp. 8-9). The argument is frivolous.

The merits of the issues raised by Memphis and the Government do not depend on the factual determinations. The factual determinations are irrelevant and will never be made should Petitioners be sustained on either of the questions presented in their respective petitions.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below reversed without further briefs or argument since the decision of the court below is so clearly contrary to, and in conflict with, the evidence and decisions of this Court on the questions presented.

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FEDERAL POWER COMMISSION *v.* UNITED GAS PIPE LINE COMPANY; and

MEMPHIS LIGHT, GAS, AND WATER DIVISION *v.* UNITED GAS PIPE LINE COMPANY.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 247 and 248. Decided October 21, 1968.

PER CURIAM.

When these cases were here the first time, we sustained the authority of the Federal Power Commission to determine the tax component of United's cost of service in accordance with the formula developed by it in *Cities Service Gas Co.*, 30 F. P. C. 158 (1963), but remanded the cases with respect to whether in applying the *Cities Service* formula it was significant that United apparently had both jurisdictional and nonjurisdictional activities and income. *FPC* v. *United Gas Pipe Line Co.*, 386 U. S. 237 (1967). Over the objections of the Commission, the Court of Appeals held that the issue had been sufficiently raised by United in its petition for rehearing before the Commission in accordance with § 19 of the Natural Gas Act, 15 U. S. C. § 717r, and that the *Cities Service* formula required that consolidated return tax savings coming to United be first allocated to United's nonjurisdictional income.

The petition for certiorari is granted and the judgment of the Court of Appeals is reversed.* Although we acquiesce in the Court of Appeals' construction of United's petition for rehearing filed with the Commission, the

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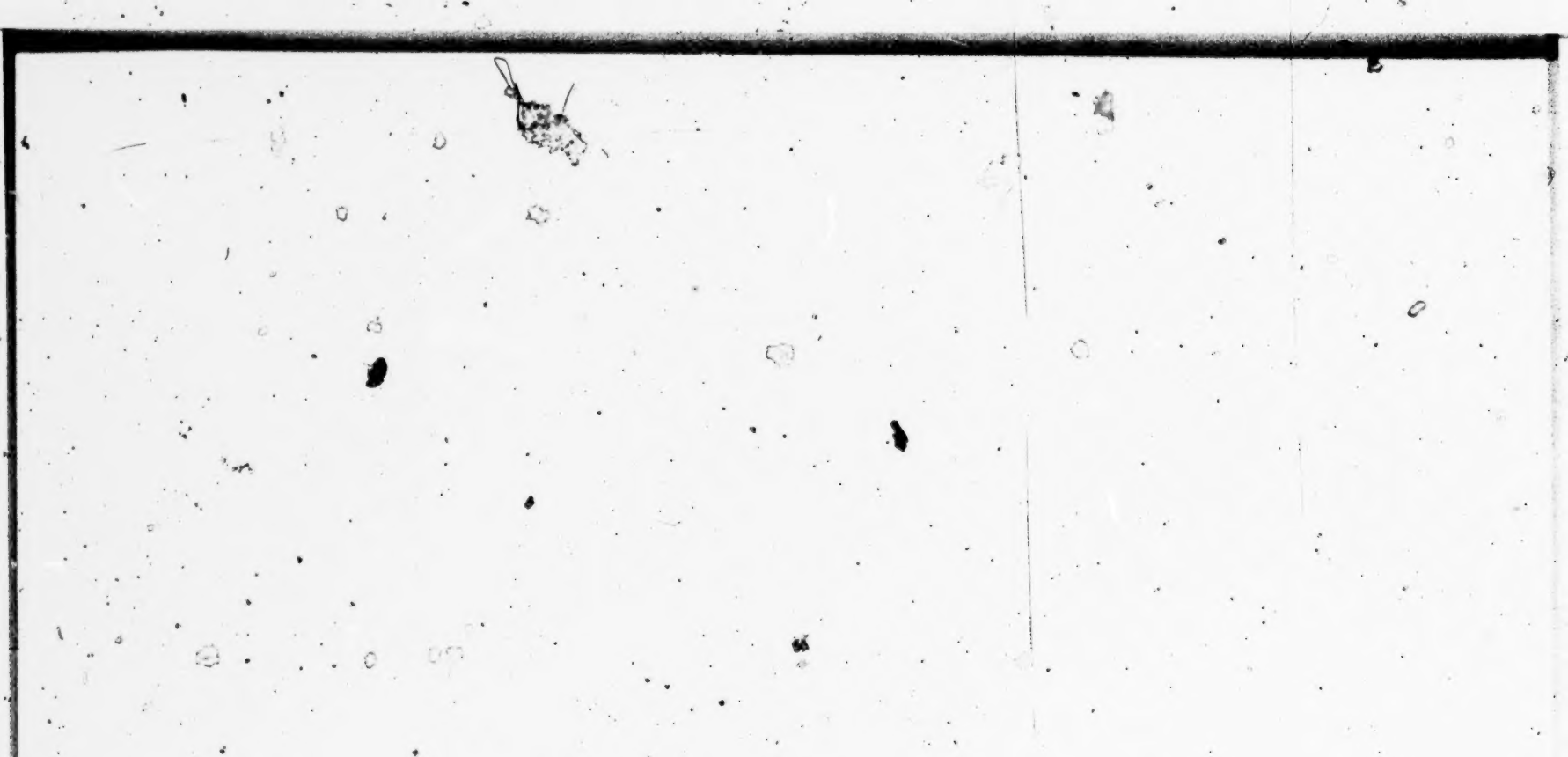
*The motion for leave to use the record in the prior proceedings before this Court, Nos. 127 and 128, October Term, 1966, is granted.

issue on remand was not in the proper posture for final determination by the Court of Appeals and should have been remanded to the Commission for further consideration. It is true that the Commission in its opinion had remarked that "United is largely a regulated company, and we shall designate it as such for the purpose of these computations." *United Gas Pipe Line Co.*, 31 F. P. C. 1180, 1190 (1964). But the Commission made no effort to justify this characterization of United in terms of the findings, the fundamentals of the *Cities Service* formula or the applicable law. This may have been because the adversary proceedings were primarily concerned with the validity of the formula itself and never focused precisely on the question of intra-company revenue and cost allocation. Whatever the reason, there was "no indication of the basis on which the Commission exercised its expert discretion," no articulation of "any rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 167, 168 (1962). On this issue the Commission's order was vulnerable on rehearing and in the Court of Appeals.

But it does not follow that the Court of Appeals, in the face of the Commission's insistence that its decision was wholly consistent with its *Cities Service* formula, should have itself determined that consolidated return savings be first allocated to nonjurisdictional income and that "income from the unregulated component of United is sufficiently large to absorb all such net tax losses and no excess remains to reduce the regulated taxable income of United." *United Gas Pipe Line Co.* v. *FPC*, 388 F. 2d 385, 391–392 (C. A. 5th Cir. 1968) (footnote omitted). These questions should have had adequate attention from the Commission in the first instance before being subjected to judicial review. Before the courts can properly review agency action, the agency must disclose the basis of its order and "give clear indication that it has exercised the discretion with which Congress has empowered it," *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197 (1941);



otherwise the courts are propelled "into the domain which Congress has set aside exclusively for the administrative agency." *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947). The judgment of the Court of Appeals is reversed and the case remanded with instructions to return the case to the Commission for further proceedings.

It is so ordered.

MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.